

**Before the
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
AND THE RURAL UTILITIES SERVICE OF THE U.S. DEPARTMENT OF
AGRICULTURE**

In the Matter of)	
)	
Joint National Telecommunications and)	Docket No. 090309298-9299-01
Information Administration-Rural Utilities)	
Service Request for Information)	
)	

To: National Telecommunications and Information Administration of the United
States Department of Commerce and the Rural Utilities Service of the U.S.
Department of Agriculture

COMMENTS OF THE BROADBAND DIVERSITY SUPPORTERS

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Synopsis of Major Proposals

Our comments are summarized below and reference (e.g., 4a) relevant response sections in our full comments.

1. In Selecting and Supporting Grant Applicants, NTIA's Highest Priority Should Include "Socially and Economically Disadvantaged Small Business" (or "SDB") Applicants [4]

- (a) **SDB Top Priority – Congress directed NTIA to accord SDB applicant grant priority [4a]**
 - The Stimulus Act – accords applicant priority to: (i) one grant per state; (ii) the merits of the applicant in providing broadband access; and (iii) whether the applicant is an SDB
 - SDB Applicant Weighting – should therefore be at least equal the other two criteria
 - No SDB "Scoring" – NTIA should not use "points" to "score" SDBs in grant evaluation [4b]
 - SDBs should simply receive weighting / emphasis in equal fashion as per above
- (b) **SDB Eligibility – NTIA should adopt efficient self-certification, avoiding new SDB barriers [4a]**
 - NTIA applicants should self-certify to compliance with the following rule for SDB eligibility:
 - *"Applicant's governance is 51% or more controlled by: (i) one or more individuals meeting the requirements of (x) 13 CFR 124.103(b)(1) or (c), and (y) the applicant's average gross revenues are less than \$40 million per year for the past three years, or (ii) an Indian Tribe, Native Hawaiian organization or Alaska Native Corporation or subsidiaries thereof."*
 - The revenue threshold is drawn from current, well-documented FCC rules for telecom
 - NTIA may request SDB revenue documentation prior to grant award
 - NTIA should adopt this pragmatic SDB test as vital to enabling meaningful SDB participation
 - Our test allows existing and to-be-formed SDBs to promptly apply for grants → SDBs must not be slowed in grant applications vs. non-SDBs given stimulus timing
 - Our test is efficient, also recognizing that SDB financial and other resources are limited
 - Any added NTIA eligibility hurdles will snuff out the very SDBs NTIA is supposed to prioritize
- (c) **NTIA Should Publish a "Report Card" to affirm SDB success in the grant process [4a]**
 - NTIA should publish real-time data on SDB success (# of grants and \$ value) vs. non-SDBs
- (d) **No Priority to Bundling – NTIA should not give priority to multi-purposed applicants [4e, 1b]**
 - Given that bundling is well-documented to penalize SDBs and favor deep-pocketed entities

2. NTIA Should Accord Highest Priority and Grant Funding to Applicants Serving the Low-Income, Minority Population Segments Across Unserved / Underserved Areas and Urban / Rural Areas [1a]

- (a) **Two Equal Barriers Account for Low Broadband in Low-Income, Minority Communities [1a]**
 - (1) Physical Access – low income communities are often the last to get broadband plant access
 - (2) Sustainable Service Offerings – even in areas where broadband is available, service offerings still need to be tailored to accommodate the needs of these communities with respect to:
 - Accommodating poor credit ratings and not requiring steep customer deposits
 - Not requiring large up-front payments for equipment
 - Making available "value" service plans tailored to these communities usage / income needs
- (b) **NTIA Should Therefore Equally Prioritize Physical Access and Sustainable Service Offerings [1a]**
 - As both are equally vital to low-income and minority broadband adoption [4f]
- (c) **NTIA Should Prioritize Low-Income / Minority Services in Unserved and Underserved Areas Alike**
 - And across market geographies, whether urban, suburban or rural areas

- (d) **Retail Price** in applicant service offerings should be but one of several factors to consider [4h]
 - In addition to deposit requirements and value propositions taking into account usage patterns

- (e) **NTIA Should Further Prioritize SDBs Focused on Low-Income, Minority Communities [1a]**
 - Given that SDBs are particularly qualified given their unique circumstances and perspective

3. NTIA Should Retain Full Grant Responsibility and Authority, But Engage the States [1a, 2]

- (a) **NTIA Role** – NTIA should retain full responsibility for evaluating, prioritizing and awarding grants
 - Ensuring that SDBs are evaluated and prioritized per Congress's directive
 - Ensuring that low-income and minority communities are prioritized
 - Ensuring that national goals cutting across state lines are prioritized
 - Avoiding legal challenges such as the longstanding non-delegation doctrine
- (b) **State Role** – states should be encouraged to provide feedback given their key local knowledge
 - NTIA should also encourage and build upon state MBE and SDB success stories

4. Grant Mechanics Should Accommodate SDB Capital and Other Limitations

- (a) **NTIA Grants Should Be Awarded at the Start of a Project for all applicants [5a]**
 - Or at least for all SDBs, recognizing limited SDB capital resources
- (b) **NTIA Should Provide SDB Flexibility in Project Completion Requirements [10]**
 - Specifically, NTIA should exempt SDBs from the two year project completion requirement (10)
- (c) **In Establishing Financial Need Necessary to Receive More Than an 80% Grant [9] –**
 - NTIA should adopt a rebuttable presumption that Historically Black Colleges and Universities (HBCUs), Hispanic Serving Institutions (HSIs), Native American Serving Institutions (NASIs), Asian American Serving Institutions (AASIs), Native American Tribal Nations and national intermediary nonprofit organizations would not be expected to generate 20% funding
 - This is not intended to exempt well-capitalized small businesses, endowments, etc.
- (d) **NTIA Should Provide Mediation to Assist SDBs on Reporting Compliance [11]**

5. Other Considerations Necessary to Meeting the Needs of the Low-income and Minority Populations

- (a) **NTIA's \$200 Million for Computer Centers** should prioritize minority serving institutions [6]
 - HBCUs, HSIs, NASIs, AASIs, Native American Tribal Nations, national intermediary nonprofit orgs.
- (b) **NTIA's \$250 Million for Programs Building Broadband Adoption** should prioritize as follows [7]:
 - Priority to programs for low-income, minority and multicultural consumers
 - Priority to national intermediary nonprofit organizations, MBEs, SDBs and similar entities with relevant history and experience
 - Priority to setting \$250 million as the floor for funding, not the ceiling
- (c) **Broadband Mapping** should take into account socio-economic population metrics [8]
 - Such as poverty status, employment, income, race and language
 - Metrics that are vital to addressing low-income and minority population needs
- (d) **The RUS Should Prioritize MBE and SDB Participation [RUS 3]**
 - For MBEs and SDBs as applicants and/or prime or subcontractors to applicants

Executive Summary

Purpose of the Grant Program. From among the five stated purposes of the Recovery Act's Broadband Telecommunications Opportunities Program ("BTOP") Grant Program, the overriding priority should be to apportion funds to provide broadband connectivity to both the unserved and underserved communities, within which the majority of funding must be targeted towards the most structurally underserved populations—low income minority consumers. Low income consumers, represented disproportionately including minorities, have a long history of being last in line to gain access to those new generations of technology and communications for two reasons: (i) depending upon their geographic location (whether urban, suburban, or rural) they may simply lack physical access to broadband communications infrastructure, where low income communities and neighborhoods in urban, suburban, and rural markets are too often the lowest or last priority of service providers; and (ii) even if the low income populations do have physical access to broadband alternatives, they are simply unable to afford the service offerings made available by the broadband carriers, in part because of price but in part because of key terms of the offering itself.

Thus, as the NTIA defines the term "unserved" for these purposes, it must be certain to give explicit and equal priority to (i) those who are unserved because they have no physical access to broadband, and (ii) those who, because of low incomes, and lack of tailored service offerings, have no practical access to broadband. The resulting class of "unserved" will cut across geographic boundaries, whether urban, suburban or rural, and it will take into account the socio-economic divide that is every bit the insurmountable barrier to broadband access as the physical lack of broadband connectedness.

Likewise, as the NTIA defines the term “underserved” for these purposes, it must provide explicit priority to the low income, disproportionately minority population. The low income population segment may have physical access to two, three, or more forms of broadband service (e.g., cable modem, DSL, wireless) but have no practical access to none given the low income of the group and lack of realistically-tailored service offerings. NTIA must prioritize broadband service to the unserved and the underserved, with the majority of such capital focused on those applicants and carriers targeting the low income, disproportionately ethnic minority segments therein.

Though the NTIA is charged with delivering not less than one BTOP award per state, the NTIA should not award the funds directly to the states to appropriate as the states see fit. Ceding NTIA’s authority to the states would create delay, inconsistent standards, and, most important, dilute the primary and direct obligation of NTIA to accord preference to an applicant that is an SDB. Furthermore, the BTOP funds are too valuable to be threatened with the entanglement of litigation under the long standing non-delegation doctrine. The agencies should not delegate allocation or administration of grants to the states.

The Role of the States. NTIA should ensure that state procurement laws, rules, regulations, and programs related to BTOP act affirmatively to accord priority consideration to SDBs as envisioned in the Recovery Act. Section 6001 of the Recovery Act, requires the Assistant Secretary, in the awarding of BTOP grants, to consider whether an applicant is an SDB. This provision expressly requires the Assistant Secretary to consider the level of minority participation in BTOP program. This is a vitally important because SDBs are among the most constrained by a lack of access to capital and among the most likely to provide immediate employment to those segments of the population that have suffered the most from

unemployment. States, therefore, must be closely monitored to ensure that they do not interfere with federal government policies or provisions for the utilization of SDBs.

Selection Criteria for Grant Awards. NTIA should make SDB success one of its very highest BTOP priorities. To do so, NTIA should give priority consideration to SDB applicants, just as Congress envisioned in the Recovery Act. This addresses the vital goals of enhancing ownership diversity and ensuring that the unique skills and perspectives of SDBs are brought to bear in solving the problem of bringing broadband service to the unserved and the underserved, particularly the low income and disproportionately ethnic minority population segment. NTIA should also implement a simple and efficient SDB self certification test, as proposed herein, to ensure that no SDB is left behind as the result of rules that suffocate the very class of SDB applicant that Congress singled out for priority consideration and deference. Finally, NTIA should report to the public and to the public its success in awarding grants to SDBs, both by number of SDB grants and by dollar value of SDB grants, to ensure that SDBs are securing the very substantial role in the grant program as envisioned by Congress.

Importantly, no priority should be given to proposals that address several purposes, serve several of the populations identified in the Recovery Act, or provide service to different types of areas. Assigning such priorities would have the effect of creating market entry barriers by encouraging “bundling” of projects, thus favoring very large applicants over SDBs and small businesses. The elimination of market barriers created by the practice of “bundling” services has been an action item addressed by both members of the legislative and executive branch. Application of the Recovery Act should avoid market entry barriers, so NTIA should not penalize SDBs with requirements for large project experience, bonding, or bundling.

Meanwhile, the NTIA should apply grant selection criteria for BTOP funds in a manner that: 1) stimulates broadband adoption and telecom literacy for low-income, minority and multicultural consumers; 2) funds minority business enterprises (MBEs), SDBs, and other organizations that have a demonstrated commitment, and ability, to support local community-based projects, and that are culturally and linguistically competent to provide products and services for low-income, minority, and multicultural communities; and 3) sets the \$250 million set forth in the Recovery Act as a floor, not a ceiling, for broadband adoption efforts. NTIA should give significant weight to applications that propose to increase broadband adoption and telecom literacy for low-income, minority and multi-cultural communities in rural and urban America to insure that these communities can fully participate in the benefits of an increasingly digital society.

Grant Mechanics. NTIA and USDA should disperse grants and loan funds at or prior to the start of the project instead of making several payments throughout the project, or a lump sum payment at the end of a project. Due to the recent financial crisis, many of the entities eligible for the NTIA and USDA programs currently do not have available funds. In addition, the federal share of any project under the NTIA program cannot exceed 80 percent, and applicants are therefore already committed to funding the remaining 20 percent of the project. If eligible entities are faced with an even larger funding liability as a result of a distribution method that does not allow for the disbursement of funds at the beginning of a project, that additional liability would be an effective undoing of the statute.

Innovative Programs. NTIA should ensure that BTOP grant money goes directly to MBEs, SDBs, and community-based organizations that have “feet in the street”—not grant-application mills that are out of touch with the real needs of the communities most in need of

help. Entities that satisfy this criteria would include MBEs, especially community-based for-profit and non-profit organizations, community technology centers, community economic development centers, workforce training centers, faith-based non-profits, social service organizations, and/or collaborative networks of these entities, and SDBs.

In establishing competitive grant criteria, Congress expressly states that NTIA may make competitive grants that “facilitate access to broadband service by low-income, unemployed, aged, and otherwise vulnerable populations in order to provide educational and employment opportunities to members of such populations.” Broadband connectivity increases educational and economic opportunities, improves job skills — in information technology as in other fields — and otherwise enhances the quality of everyday work and home life. For those reasons, we agree with the NTIA’s interpretation that the \$250 million specifically mentioned in the Recovery Act establishes a floor, not a ceiling, for grant funds targeted to increase broadband adoption.

Broadband Mapping. Accurate maps indicating broadband coverage are essential to the success of BTOP. Knowing where broadband service is available makes it easier to determine what areas are unserved or underserved, thereby ensuring that these communities have priority as deployment projects are developed. NTIA should require that broadband maps are multifunctional and layered to include social metrics. Though mapping regional and local broadband technical characteristics such as broadband availability, competitive service, speed, price, and adoption rates is essential, it is just as important to map and display social metrics relating to poverty status, employment status, income, race, and language predominance. Mapping should be done in a way that allows the public to ascertain the technical progress for each social metric. Social data used in mapping has helped to identify or close social divides in

public education, housing, health care, resource management, banking and credit availability, pollution, electoral participation, and insurance.

Data collection for both technical and social metrics should be done at the census tract or street level. Collecting granular data ensures that broadband maps will more accurately reflect what neighborhoods are unserved and underserved. NTIA should reject broadband mapping methods based on zip codes because they tend to overestimate the rate of broadband penetration, especially in rural areas where zip codes are rather large. The presence of one broadband subscriber in a zip code area does not mean that all residents in that area have access to broadband service.

Financial Contributions by Grant Applicants. NTIA and RUS should adopt a rebuttable presumption that specifies that HBCUs, HSIs, AASIs, and NASIs, Native American Tribal Nations, as well as nonprofit organizations, would not be expected to generate, internally or from third-party sources, 20 percent of a project's cost. Requiring grant applicants to put up 20 percent of a project's cost is an unnecessary market entry barrier that works to the disadvantage of public interest organizations and universities that are working to correct the very institutional mechanisms that have historically allowed deep-pocketed incumbents to provide large amounts of collateral, to the exclusion of applicants working in the non-profit and educational sectors.

Timely Completion of Proposals. NTIA should avoid any BTOP contract requirements and procurement practices that could cause underutilization or exclusion of most SDBs. These practices include needlessly short deadlines for the commencement and completion of projects. Thus, SDBs should be exempted from the two year project completion deadline requirement. For far too long, SDBs have been systematically excluded from contract and procurement

opportunities based on onerous requirements and unrealistic deadlines. In order to avoid the continuation of such unfair practices, NTIA should not create within the BTOP common exclusionary tactics such as excessive bonding requirements, bundling of small and medium sized projects into large packages, a requirement of previous “very large project” experience, and a requirement of a minimum number of years in business.

Reporting and Deobligation. NTIA should contract with a professional mediation firm (“ADR”) or firms that possess telecommunications industry experience, and refer potentially troubled projects to the firm(s) to attempt to resolve difficulties that otherwise could lead to deobligation. This will assist new SDBs who are often unfamiliar with the government contracting process, to become more adept at meeting project reporting and other administrative requirements. As a result of the difficulty in obtaining working capital, credit, and project financing, many SDBs experience problems in acquiring the project management expertise that is needed for government contracting. NTIA should make all efforts to ensure vigorous participation of SDBs in BTOP. By referring potentially problematic projects to a telecommunications mediation firm, the NTIA could resolve potential reporting problems before they lead to deobligation. This will help to ensure a maximum level of SDB participation in the BTOP.

Coordination with USDA’s Broadband Grant Program. NTIA should establish a mechanism that permits it to track and report to the public and Congress the success of SDBs with respect to number and dollar amount of grant awards. This will provide the data necessary to ensure that SDBs are achieving the very substantial level of grant success envisioned by Congress. For its part, the Rural Utilities Service (RUS) should take steps to affirmatively support SDB applicants and applicants who are partnered with, as prime or subcontractors, with

SDBs. To gauge RUS success in this regard, RUS should provide the same kind of reporting to the public and to Congress as provided by NTIA. And in that regard, RUS should coordinate with NTIA to either use NTIA's system or establish its own comparable reporting system.

Measuring the Success of the BTOP. The success of the BTOP will be measured by the cumulative success of the individual programs funded by each grant. Because of the anticipated large number of grants, and the fact that likely they will be awarded in three sequential groups spanning a year, it is vitally important to the overall program that success be measured accurately and in a transparent manner early in the process through the quarterly reports that each grantee must submit pursuant to Section 6001((i)(1) of the Recovery Act. NTIA should establish and fund a National Minority and Broadband Training and Technical Council to evaluate the success of projects on specified criteria and, as appropriate, to make suggestions for improvement. Doing so would help to measure (1) participation by qualified socially and economically disadvantaged small business concerns as provided by Section 6001(h)(3) of the Recovery Act; and (2) success in attaining the statutory objectives of (a) increasing the affordability and subscribers to broadband in the area addressed; (b) providing the fastest broadband speed possible to subscribers; and (c) enhancing health care delivery and education as provided by Section 6001(h)(2) of the Recovery Act.

The Recovery Act appropriately establishes that the quarterly reports of all grantees will be published on the Internet, but publication of thousands of reports in thousands of different formats will not necessarily lead to the intended transparency and meaningful public review without more. In addition to ensuring that broadband facilities be built out to unserved and underserved geographic areas, grantees also must be required to report on new subscribership that results from the build out and in particular, how socially and economically disadvantaged

persons have been served. This should include information on subscription rates, community training programs to demonstrate broadband opportunities and services, and access to broadband-enabled computers in public places such as libraries and schools.

RUS Issues. Rural areas that stand to benefit the most from Recovery Act funding are unserved or underserved low-income, minority and multilingual rural communities. To ensure that these rural areas benefit from the Recovery Act funding opportunity, RUS should evaluate the socioeconomic characteristics of a project area, in addition to evaluating whether the project area meets the qualification provisions in the Recovery Act appropriation language. This evaluation would include understanding the pricing needs of low-income, aged, unemployed, and otherwise vulnerable populations. Furthermore, RUS should evaluate whether qualified applicants are located in historically underserved communities, communities with a single provider, and communities receiving service at speeds below the minimum. By making this evaluation, RUS will be able to determine which rural area will benefit the most from the available funds.

NTIA and RUS should coordinate their efforts to ensure that eligibility requirements and programmatic elements do not thwart the objectives of the Small Business Administration's diversity objectives. In other words, applicants should be encouraged to incorporate and maximize SDB and/or MBE sponsorship in both applications if submitted to each of NTIA and RUS. To the extent that an applicant submits applications to both agencies, the NTIA and RUS should coordinate and provide oversight to ensure that, in awarding grants, NTIA and RUS give priority to the application proposal that maximizes SDB and MBE participation or sponsorship, whether that be the NTIA or the RUS application.

RUS should consider the substantial participation of SDBs in the BTOP program a top priority. RUS should also avoid contract provisions that could lead to underutilization or exclusion of SDBs, such as aggregating discrete projects or geographic areas into needlessly large bundles, imposing needlessly short deadlines for commencement/completion of a project, previous very large project experience, and imposing excessive years-in-business or bonding requirements.

Further, RUS should establish expedited and favorable (at least tie-breaker) consideration for prime contractors that voluntarily include in their bids genuine and substantial first tier MBE or SDB participation beyond the minimum federal Section 8(a) guidelines for MBE or SDB utilization, and have an established method to track and report verifiable outcomes on a periodic basis. RUS should also establish expedited and favorable consideration for bids that voluntarily propose substantial initiatives to hire and train skilled and low-skilled unemployed minority labor in broadband technologies.

The Recovery Act requires the Secretary of Agriculture to report quarterly to Congress, and recipients similarly should be required to report quarterly on key progress aspects of their program. To facilitate analysis and aggregation, these reports should be required to be filed electronically and should be available immediately on a public website to foster transparency and to permit viewing by residents in the target area of each grantee. RUS should include benchmarks to measure the participation of qualified SDB concerns specifically and adopt benchmarks evaluating participation under USDA's existing Section 8(a) authority more generally.

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To: National Telecommunications and Information Administration of the United States Department of Commerce and the Rural Utilities Service of the U.S. Department of Agriculture

COMMENTS OF THE BROADBAND DIVERSITY SUPPORTERS

The Broadband Diversity Supporters¹ respectfully respond to the Joint Request for Information by the Department of Commerce's National Telecommunications and Information Administration ("NTIA") and the United States Department of Agriculture Rural Utilities

¹ Henry M. Rivera, Chair of MMTC, has recused himself from this matter and did not participate in the formulation or submission of these Comments. The organizations and companies signing onto these Comments as the Broadband Diversity Supporters are listed and described in Appendix A hereto.

Service (“RUS”), regarding implementation of the American Recovery and Reinvestment Act of 2009 (“Recovery Act”)² Broadband Initiatives.³

I. Introduction

The Broadband Diversity Supporters involve 35 national organizations (including essentially all of the major civil rights organizations), 13 minority business enterprises (“MBEs”) or socially and economically disadvantaged business concerns (“SDBs”), interested in (i) promoting broadband connectivity to unserved and underserved low-income minority and multilingual rural and urban communities, and (ii) promoting diversity of ownership among businesses in the communications industry. For ease of reference, the headings below and the numbering thereof match the numbering of the questions in the Joint Request for Information. Where the Broadband Diversity Supporters have not addresses in these Comments a particular question appearing in the Joint Request for Information, the question (and the associated numbering) does not appear in these comments.

II. NTIA Request for Information

² American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (hereinafter “Recovery Act”).

³ Department of Commerce, National Telecommunications and Information Administration, Department of Agriculture, Rural Utilities Service, American Recovery and Reinvestment Act of 2009 Broadband Initiatives, Joint Request for Information and Notice of Public Meetings, 74 Fed. Reg. 10716 (Mar. 12, 2009) (“hereinafter “Joint Request for Information”).

1. The Purpose of the Grant Program: Section 6001 of the Recovery Act establishes five purposes for the BTOP grant program.

a. Should a certain percentage of grant funds be apportioned to each category?

No. Among the five stated purposes of the Recovery Act's Broadband Telecommunications Opportunities Program ("BTOP") Grant Program,⁴ the overriding priority should be to apportion funds to provide broadband connectivity to both the unserved and underserved communities, within which the majority of funding should be targeted towards the most needy structurally underserved populations, namely low income minority consumers. The highest priority of all should be to provide new or competitive or sustainable service to those low income communities whose poverty is linked to racial discrimination in the form of credit redlining and thus has lingered persistently across many generations.

Low income consumers, disproportionately including racial ethnic minorities, have a long history of being last in line to obtain to the new generations of technology and communications access which are the basic steppingstones to social and economic advancement in our society. Whether located in urban, suburban, or rural areas, low income communities have been last in line for state-of-the-art, competitive broadband for two reasons: (i) they may simply lack physical access to broadband communications infrastructure, since service providers may have found that unsubsidized service to low income communities and neighborhoods cannot generate

⁴ Recovery Act Sec. 6001(6).

sufficient return on investment; and (ii) even if the low income populations do have physical access to broadband alternatives, these consumers they are simply unable to afford the prices and terms of the service offerings made available to them.

BTOP grants should be tailored to enable service providers to provide broadband service offerings tailored to address the unique limitations of low income populations. Such offerings should be structured to: (i) provide access to those who do not have good credit scores; (ii) not require large deposits in order to qualify for service; (iii) not require large up-front payments for equipment; and (iv) provide attractive “value” packages that low income consumers can realistically afford, that fit their usage patterns and need, and that they can therefore embrace as an attractive value proposition on a monthly basis.⁵

As NTIA defines the term “unserved” for these purposes, it should give explicit and equal priority to: (i) those who are unserved because they have no physical access to broadband, and (ii) those who, because of low incomes, and lack of tailored service offerings, have no practical access to broadband. The definition of the term “unserved” should therefore cut across

⁵See Horrigan, John B., Pew Internet & American Life Project, Home Broadband Adoption 2008, July 2008, at 12, *available at* <http://www.pewinternet.org/Reports/2008/Home-Broadband-2008.aspx> (hereinafter “Pew Study”) (last visited April 13, 2009) (“...socio-economic and demographic factors play large roles in explaining whether someone has broadband or not. Upper-income Americans are more than three times more likely to have broadband than low-income Americans to have broadband at home.”).

geographic boundaries, whether urban, suburban or rural,⁶ and take into account the socio-economic divide that is every bit the insurmountable barrier to broadband access as the physical lack of broadband connectedness.⁷

Likewise, as NTIA defines the term “underserved,” for these purposes, NTIA should provide explicit priority to the low income, disproportionately minority population. Low income populations may have physical proximity to two, three, or more forms of broadband service (e.g., cable modem, DSL, wireless), but they likely will yet have no practical access to these services given their low income and the lack of tailored service offerings. In short, NTIA should give priority of the extension of broadband service to the unserved and the underserved, with the majority of such capital focused on those applicants and carriers targeting the low-income, disproportionately minority populations within those groups and areas.

To assist broadband-deprived low-income minority and multilingual rural or urban communities, BTOP should also assign highest priority to funding socially and economically disadvantaged business concerns (“SDBs”), including those with established connections to the community to be served, as well as Historically Black Colleges and Universities, Hispanic Serving Institutions, Native American Serving Institutions, and Asian American Serving

⁶ See H.R. Conf. Rep. No. 16, 111th Cong., 1st Sess. 774 (2009) (“The Conferees intend that the NTIA award grants serving all parts of the country, including rural, suburban, and urban areas.”).

⁷ See Pew Study, *supra* note 5, at 11 (“Affordability Matters: 35% of dial-up users say they would switch to broadband if the price fell”), 12 (“43% of non-internet users have household incomes under \$30,000 per year”).

Institutions, as well as to minority contractors and subcontractors. Apportionments on this basis would be consistent with the purposes of the Recovery Act: the funds would support SDBs and schools and organizations whose missions and expertise generally include facilitating greater use of broadband service by vulnerable populations. SDBs generally undertake to provide job opportunities to disadvantaged persons in the communities they serve; further, they tend to work with other SDBs, thereby reticulating dollars within a community and providing that community with economic stabilization.⁸ Likewise, the NTIA should establish and fund a National Minority Broadband Training and Technical Counsel within NTIA, to ensure that BTOP funds are apportioned and deployed correctly and that the purposes of the BTOP Grant Program are being fulfilled.

While NTIA is charged with providing not less than one BTOP award per state,⁹ this does not mean that NTIA is to simply turn over the funds directly to the states to appropriate as the

⁸ See Recovery Act Sec. 6001(b)(3)(A-B), and Sec. 6001(b)(5). The purposes of the program are to:

- (3) provide broadband education, awareness, training, access, equipment, and support to:
 - (A) schools, libraries, medical and healthcare providers, community colleges, and other institutions of higher education, and other community support organizations and entities to facilitate greater use of broadband service by or through these organizations;
 - (B) organizations and agencies that provide outreach, access, equipment, and support services to facilitate greater use of broadband service by low-income, unemployed, aged, and otherwise vulnerable populations; and....
- (5) stimulate the demand for broadband, economic growth, and job creation.

Id.

⁹ Recovery Act Sec. 6001(h)(1).

states see fit. Ceding NTIA's authority to the states would create delay, inconsistent standards, and, most important, dilute the primary and direct obligation of NTIA to provide funding priority to SDBs. Furthermore, the BTOP funds should not be threatened with the entanglement of litigation under the non-delegation doctrine. Leaving the states to control the funds would result in a tangle of goals, objectives, standards, supervision, transparency, and accountability. Such a Balkanized result was not the intent of Congress when it adopted this comprehensive federal program.

b. Should applicants be encouraged to address more than one purpose?

See discussion below in NTIA Section 4 (e).

2. Role of the States: The Recovery Act States that NTIA may consult the States (including the District of Columbia, territories, and possessions) with respect to various aspects of the BTOP. The Recovery Act also requires that, to the extent practicable, the BTOP award at least one grant to every State.

a. How should the grant program consider State priorities in awarding grants?

In awarding BTOP grants, NTIA should ensure that state procurement laws, rules, regulations, and programs related to BTOP act affirmatively to accord priority consideration to SDBs as envisioned in the Recovery Act. Section 6001 of the Recovery Act requires the Assistant Secretary, in the awarding of BTOP grants, to consider whether an applicant is an

SDB.¹⁰ This is vitally important because SDBs are constrained by a lack of access to capital and among the most likely to provide immediate employment to those segments of the population that have suffered the most from unemployment.

States must therefore be closely monitored to ensure that they do not interfere with federal government policies or provisions for the use of SDBs. NTIA should take a strong leadership role to ensure that states operate in tandem with the NTIA with respect to SDB priorities and with respect to other federal government contracting, subcontracting and procurement guidelines associated with BTOP grants. Further, NTIA should support the efforts of those states, such as Maryland and California that have promoted SDB and MBE contracting through the use of MOUs with carriers.¹¹

b. What is the appropriate role for the States in selecting projects for funding?

States should be given an opportunity to provide their input with respect to prioritizing local projects for BTOP funding. Nevertheless, NTIA must retain clear and decisive responsibility for all aspects of the grant process, including for evaluating, prioritizing, and

¹⁰ Recovery Act Sec. 6001 (h)(3) (“The Assistant Secretary, in awarding grants under this section, shall, to the extent practical, consider whether the applicant is a socially and economically disadvantaged small business concern as defined under section 8(a) of the Small Business Act (15 U.S.C. 637).”

¹¹ See *infra* NTIA Section 2(c).

awarding grants. States might provide important information on unique local needs, but only NTIA is in a position to consider the broader perspective necessary to make informed disbursements of grant funding as mandated by Congress. In that regard, NTIA must balance interests among states. NTIA should evaluate applicants whose projects cover multiple states or have national dimensions important to this nation as a whole. And most importantly, only NTIA can properly shepherd SDB applicants through the grant process to ensure that these applicants achieve the substantial level of success envisioned by Congress.

c. How should NTIA resolve differences among groups or constituencies within a State in establishing priorities?

As noted above, NTIA must retain responsibility for establishing priorities and for grant decision-making. However, NTIA may learn from the states with respect to minority contracting, which may assist NTIA in project prioritization. For example, NTIA should learn from and value the leadership of state public utility commissions that have taken affirmative steps to ensure that public utilities have diverse supplier programs.¹² A shining example of one

¹² See California Public Utilities Commission, Utility Supplier Diversity Program, <http://www.cpuc.ca.gov/PUC/supplierdiversity/> (last visited April 1, 2009) (The Commission implements a program that monitors supplier diversity in procurements by participating utilities and oversees a clearinghouse of women, minority and disable veteran-owned business enterprises.). See also Maryland Public Service Commission, http://webapp.psc.state.md.us/Intranet/sitesearch/whats_new/MOU%20release%202-12-09.pdf (last visited April 1, 2009) (The Commission and 10 Maryland public utilities signed a

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such program is that developed by the Maryland Public Service Commission (“MPSC”). MPSC has entered into Memoranda of Understanding (“MOU”) with many of its regulated utility providers, including broadband carriers.¹³ According to the provisions of some of these MOUs, utility providers have voluntarily agreed to strive to meet Maryland’s goal for SDB participation in their contracting and subcontracting operations. The utility companies also agree to develop, implement, and consistently report on the strategies they have implemented to promote maximum opportunities for contractors and subcontractors to compete and participate in all facets of the utility supply chain.¹⁴ This is critically important to the fundamental objectives of the BTOP program because utilities will be among the active participants in the program. In

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Memorandum of Understanding (MOU) stating that each participating utility agreed to strive to meet the State’s 25 percent goal for Minority Business Enterprise (MBE) participation.)

¹³ See Maryland Public Service Commission, Supplier Diversity, Signed Memorandum of Understanding, *available at* http://webapp.psc.state.md.us/Intranet/utility/sdiversity_new.cfm (last visited April 1, 2009) (Maryland Public Service Commission signed Memoranda of Understanding with the following: Association of Maryland Pilots; Baltimore Gas & Electric Company, Delmarva Power & Light Company; First Transit’s Baltimore Washington International Thurgood Marshall Airport Shuttle Bus Contract; Potomac Electric Power Company; Qwest Communications Company, LLC; The Potomac Edison Company dba Allegheny Power; Verizon Maryland Inc.; Washington Gas Light Company; and XO Communication Services, Inc.).

¹⁴ See *id* (“[C]ontract and subcontract for the purchase of all goods and services governed by this MOU, including, but not limited to, equipment, supplies, materials, construction ventures, legal, accounting and financial services, technology-related research and development, testing, and other procurable goods and services...”).

short, NTIA can improve prospects for SDB success by absorbing and leveraging state SDB success stories, promoting them as best practices nationwide, and considering these MOUs when awarding BTOP grants.

4 Establishing Selection Criteria for Grant Awards: The Recovery Act establishes several considerations for awarding grants under the BTOP. In addition to these considerations, NTIA may consider other priorities in selecting competitive grants.

a. What factors should NTIA consider in establishing selecting criteria for grant awards? How can NTIA determine that a Federal funding need exists and that private investment is not displaced? How should the long-term feasibility of the investment be judged?

Priority Consideration for SDBs. The Recovery Act establishes three basic considerations for awarding grants under the BTOP,¹⁵ which can be summarized as follows: (i) one grant per state; (ii) the relative merits of the project in terms of efficiency and other factors; and (iii) the status of an applicant as an SDB. Accordingly, these mandated considerations should be given equal weight as the congressional language provides. In short, Congress clearly holds the Assistant Secretary of the Department of Commerce accountable for awarding substantial grants to SDB applicants, both in terms of numbers and in terms of the sum total of grant dollars awarded to SDB applicants.

¹⁵ See Recovery Act Sec. 6001(h).

Very substantial NTIA weighting is therefore properly placed on SDB grant applicants. Such weighting has numerous benefits. First, it helps to reduce the well-documented market-entry barriers for small and minority owned businesses, particularly those competing against larger companies with substantially greater resources. Second, it places a substantial portion of the grant funds in the hands of those companies that, by virtue of their ownership and leadership, are ideally positioned to address the unique needs of the unserved and underserved communities, particularly low income and minority populations. And third, small businesses are well understood to be the primary engine of new job creation in the United States, and they are best positioned to create those jobs that our economy so badly needs.

SDB Eligibility Requirements. Critical to SDB success are the specific SDB eligibility requirements that NTIA adopts. As its highest priority, NTIA should pragmatically ensure broad-based access to the grant program by the widest number of SDBs possible, including established SDB concerns as well as new entrant and yet-to-be-established business concerns. In that way, NTIA would ensure that Congress's intent to provide very substantial emphasis and priority to SDB applicants is not frustrated because of administrative hurdles erected by the NTIA. Any undue administrative burden imposed by NTIA on SDB applicants will inevitably handicap the ability of SDBs ability to timely and efficiently complete applications in a broadband grant process characterized by rapidly approaching and very tight grant application windows. Potential SDB grant applicants are now wholly consumed with preparing business plans and funding applications. SDBs, more than others, are constrained by limited resources, and NTIA should be very careful not to add to SDBs' application pressures by distracting them with a burdensome or time-consuming certification process.

Accordingly, in the interest of time NTIA should authorize simple self-certification of SDB eligibility. Applicants would confirm their SDB status as a “socially and economically disadvantaged small business” by certifying to the following requirement on BTOP applications:

Applicant’s governance is 51 percent or more controlled by: (i) one or more individuals meeting the requirements of 13 CFR 124.103(b)(1) or (c), and the applicant’s average gross revenues are less than \$40 million per year for the past three years, or (ii) an Indian Tribe, Native Hawaiian organization or Alaska Native Corporation or subsidiaries thereof.¹⁶

To validate this certification, NTIA may request reasonable supporting documentation to be provided by an applicant to NTIA prior to funding a grant to confirm, as an example, the applicant’s revenues. This self-certification approach would permit SDBs to complete an application process as efficiently as non-SDB applicants in what is by economic necessity a fast-moving BTOP grant process.

NTIA should also provide consideration to applicants, which are not themselves SDBs but who have formed substantial partnerships with SDBs, where the SDB is acting as a primary contractor or a subcontractor to the applicant and where the SDB self-certifies its eligibility per

¹⁶ The \$40 million is drawn from the FCC’s Designated Entity (or “DE”) rules (47 CFR 24.321) defining small business eligibility for the purpose of acquiring wireless spectrum licenses in FCC auctions. We believe that the FCC’s benchmark are most relevant here given that: (i) they reflect sizing standards relevant to the communications industry, (ii) they are current, having been used as recently as 2008 in the FCC’s \$19 billion auction of 700 MHz licenses, and (iii) they were developed as the result of a lengthy record and have a longstanding history of application and experience.

the preceding paragraph. This added consideration given by NTIA to such SDBs would serve to further advance the goals of Congress with respect to socially and economically disadvantaged small businesses.

NTIA Reporting and Accountability for SDB Success. During the course of granting awards, NTIA should provide data to the public and to Congress that clearly demonstrates NTIA's adherence (or not) to the goals of Congress for SDBs in the form of a real-time SDB report card. Specifically, NTIA should provide data on SDB grants awards, both individually and in aggregate, detailing both the number of SDB grants and the dollar amount associated with SDB grant awards versus non-SDB grant awards. This information will permit the public, along with other interested agencies such as the GAO, to evaluate whether SDBs are achieving the substantial role—both in number of SDB grant winners and in dollar share of grants won by SDBs in aggregate—envisioned in the Recovery Act. It will also “allow the public to understand and monitor grants awarded under the program.”¹⁷

Summary. In summary, NTIA must make SDB success one of BTOP's very highest BTOP priorities. First, NTIA must give very substantial priority consideration to SDB applicants, just as Congress envisioned in the Recovery Act. This addresses the vital goals of enhancing ownership diversity and ensuring that the unique skills and perspectives of SDBs are brought to bear in solving the problem of bringing broadband service to the unserved and the underserved, particularly the low income and disproportionately minority population segment. It

¹⁷ Recovery Act Sec. 6001(i)(5).

also recognizes the fact that small businesses are the longstanding engines of job creation. Second, NTIA should implement a simple and efficient SDB self certification mechanism, as proposed herein, to ensure that no SDB is left behind as the result of rules that suffocate the very class of applicant that Congress singled out for priority consideration. Finally, NTIA should report to the public and Congress its success in awarding grants to SDBs, both by number of SDB grants and by dollar value of SDB grants, to ensure that SDBs are securing the very substantial role in the grant program as envisioned by Congress.

b. What should the weighting of these criteria be in determining consideration for grant and loan awards?

NTIA should not apply any specific, pre-determined weighting or point system with respect to an applicant being eligible or not as an SDB. Rather, NTIA should recognize that Congress provided for three equal grant criteria: (i) at least one grant per state; (ii) the merits of the application with respect to the most broadband reaching the most people of interest; and (iii) whether the applicant is an SDB.¹⁸ Accordingly, these mandated considerations should be provided equal weight consistent with the congressional language provides. Any point system may serve to undermine the priority and goals of ensuring meaningful participation by SDBs.

¹⁸ Recovery Act Sec. 6001(h)(2)(3).

c. How should the BTOP prioritize proposals that serve underserved or unserved areas? Should the BTOP consider USDA broadband grant awards and loans in establishing these priorities?

Please see answer to question 1(a) above.

e. Should priority be given to proposals that address several purposes, serve several of the populations identified in the Recovery Act, or provide service to different types of areas?

No. Priority should not be given to proposals that address several purposes, serve several of the populations identified in the Recovery Act, or provide service to different types of areas. Assigning such priorities would have the effect of creating market entry barriers by encouraging “bundling” of projects, thus favoring very large applicants over SDBs and small businesses.

The elimination of market barriers created by the practice of “bundling” services has been an action item addressed by both members of the legislative and executive branch. The elimination of market barriers was supported by the leadership of Congressional Minority Group Caucuses, at the time the Recovery Act was in conference.¹⁹ Furthermore, during a March 26, 2009 town hall meeting, President Obama made clear that his administration is working to

¹⁹ Congressional Black Caucus, Congressional Hispanic Caucus, and Congressional Asian Pacific American Caucus leaders indicated in a letter to the Speaker of the House at the time the Recovery Act was in conference that they supported the House version of the Bill that ensured all qualified businesses would be qualified for grants, rather than limiting business qualification through the discretion of the states. Letter from Congressional Black Caucus et al. to Nancy Pelosi (Feb. 10, 2009), at Appendix C.

unbundle services to promote competition and give all businesses a chance to compete for government purchases.²⁰

Application of the Recovery Act should avoid market entry barriers, so NTIA should not penalize SDBs with requirements for large project experience, bonding, or bundling. Instead, the application of the Recovery Act should provide SDBs with necessary latitude to overcome market barriers.

²⁰ See President Obama March 26, 2009 Town Hall Meeting Transcript, *available at*: http://www.realclearpolitics.com/articles/2009/03/obama_online_townhall_transcript.html (last visited, April 1, 2009).

CARLOS DEL TORO: "...my question to you is, will your administration look at this issue and try to unbundle these contracts that make it more competitive for small businesses to work in the federal marketplace?"

PRESIDENT OBAMA: "It may be that Carlos has a better product to sell -- (laughter) -- you know, for a segment of that contract, but he can't bid on the entire thing, all right? And so what ends up happening is the taxpayer loses the benefit of a better product at a better price because everything is bundled into this huge contract with a giant general contractor who then divvies up the business...we can unbundle and unpackaged some of these goods and services that the government purchases. It'll save taxpayers' money. It'll promote more competition. Carlos is still going to have to bid. He's still going to have to prove that his price is better and his product is better, but at least he's got a chance."

Id.

f What factors should be given in determining whether proposals will encourage sustainable adoption of broadband service?

NTIA should favor applications that provide for sustainable adoption of broadband service, particularly broadband options that are affordable and accessible to all socioeconomic levels in a community, and most importantly including the low income and disproportionately minority populations. We recommend that NTIA further this objective, and oppose any delegation of this task to the states.²¹

h What role, if any, should retail price play in the grant program?

Retail price is just one of several factors that should play a role in the grant program as a key factor to reaching the low income segment of the populations. Many end-users are without broadband access not because they live in unserved areas, but because they live in urban, suburban, or rural area where the service offering (e.g., cable modem, DSL, or wireless) is not within the customer's economic reach. Price may be one factor. Other barriers may include: a customer's poor credit record or lack of credit record; a customer's inability to afford the up front payment for the equipment; a customer's inability to afford a deposit; and a service not tailored to the customer's particular usage pattern and therefore having a more limited value

²¹ See *infra* NTIA Section 2.

proposition.²² So while retail price is a consideration, it is but one of several factors to be considered in evaluating the merits of an applicant's service offering.

5. Grant Mechanics: The Recovery Act requires all agencies to distribute funds efficiently and fund projects that would not receive investment otherwise.

(a) What mechanisms for distributing stimulus funds should be used by NTIA and USDA in addition to traditional grant and loan programs?

To the extent possible, NTIA and RUS should disperse grants and loan funds at or prior to the start of the project instead of making several payments throughout the project, or a lump sum payment at the end of a project. Due to the recent financial crisis, many of the small business and nonprofit entities eligible for NTIA and RUS programs currently do not have available funds in their treasuries to underwrite initial phases of a project if a waiver is unavailable. In addition, the federal share of any project under the NTIA program cannot exceed 80 percent, and applicants are therefore already committed to funding the remaining 20 percent of the project.²³ If eligible entities are faced with an even larger funding liability as a result of a distribution method that does not allow for the disbursement of funds at the beginning of a

²² See Pew Study *supra* note 5, at 11 ("Affordability Matters: 35% of dial-up users say they would switch to broadband if the price fell"), 12 ("43% of non-internet users have household incomes under \$30,000 per year").

²³ Recovery Act, Sec. 6001(f). Under the NTIA program, federal funds cannot exceed 80% of a project unless the applicant petitions the Assistant Secretary of the Department of Commerce for a waiver and the Assistant Secretary determines that the petition demonstrates financial need. *Id.*

project, that additional liability would be an effective undoing of the statute. This is a particularly sensitive consideration for SDBs and nonprofits who have but a small fraction of the financial resources of the larger communications companies and for whom access to capital is most difficult. Therefore, if funds are to be distributed at anything other than the start of a project, NTIA should make an exception for SDBs and nonprofits who would instead receive all or most grant funding at the start of a project.

6. Grants for Expanding Public Computer Center Capacity: The Recovery Act directs that not less than \$200,000,000 of the BTOP shall be awarded for grants that expand public computer center capacity, including at community colleges and public libraries.

(b) What additional institutions other than community colleges and public libraries should be considered as eligible recipients under this program?

Priority should be given to Historically Black Colleges and Universities (“HBCUs”), Hispanic Serving Institutions (“HSIs”), Native American Serving Institutions (“NASIs”), Asian American Serving Institutions (“AASIs”), and rural colleges and universities that serve minorities but do not qualify as HBCU, HIS, AASIs, or NASI; and nonprofit organizations that provide broadband training.

HBCUs²⁴ have a long history in the United States. Defined by a mission rather than a race, they arose from a society of enforced segregation²⁵ to become an integral source of education²⁶ and a source of pride for the community.²⁷ While HBCUs give many the opportunity

²⁴ HBCUs are defined as: "...any historically Black college or university that was established prior to 1964, whose principal mission was, and is, the education of Black Americans, and that is accredited by a nationally recognized accrediting agency or association determined by the Secretary to be a reliable authority as to the quality of training offered or is according to such an agency or association, making reasonable progress toward accreditation...." See 20 U.S.C. Sec. 106(2) (2009).

²⁵ See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²⁶ Kevin D. Brown & Vinay Sitapati, *Race Across Boundaries: Lessons Learned from Comparing the Application of Constitutional Law and Federal Anti-Discrimination Law to African-Americans in the U.S. and Dalits in India in the Context of Higher Education*, 24 Harv. BlackLetter J.3,31 (2008), quoting in part David H. Jackson, Jr. *Attracting and Retaining African-American Faculty at HBCUs*, 123 Educ. 181, 182 (2002); and citing to Alfreda, A. Sellers Diamon, *Serving the Educational Interests of African American Students at Brown Plus Fifty: Historically Black Colleges or University Affirmative Action Programs*, 78 Tul. L. Rev. 1877,1888-92 (2004) ("HBCUs historically accounted for the majority of black professionals. For example, by the early 1990s these institutions had produced almost '40[%] of America's black college graduates...[,] 80[%] of black federal judges, 85[%] of all black doctors, 75[%] of all black Ph.D.s., 50[%] of black engineers, and 46[%] of all black business professionals... . Moreover, historically black health-profession schools have trained an estimated 40[%] of black physicians, 75[%] of black veterinarians and 50[%] of black pharmacists, and 40[%] of the nation's black dentists.'" (citations mitted)). See also, U.S. Department of Education: White House Initiative on Historically Black Colleges and Universities, available at <http://www.ed.gov/about/inits/list/whhbcu/edlite-index.html> (last visited April 10, 2009) ("HBCUs enroll 14 percent of all African American students in higher education...in 1999, these institutions matriculated 24 percent of all African American students enrolled in 4 year colleges, awarded masters degrees and first-professional degrees to about one in six African American

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to succeed in a post-secondary education, their legacy continues to be hampered by the effects of past segregation. The HBCUs are constantly engaged in a struggle to finance their curriculum and facilities²⁸ and thus should be given support in these extraordinarily difficult financial times.

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men and women, and awarded 24 percent of all baccalaureate degrees earned by African Americans nationwide.”).

²⁷ See, Brown & Sitapati, *Race Across Boundaries*, *supra*, at 27. See also, U.S. Department of Education, *supra* note 26. See also, 20 U.S.C. 1060(1) (“historically Black colleges and universities have contributed significantly to the effort to attain equal opportunity through postsecondary education for Black, low-income, and educationally disadvantaged Americans”).

²⁸ 20 U.S.C. 1060 (2)-(4) (2009) (“States and the Federal Government have discriminated in the allocation of land and financial resources to support Black public institutions under the Morrill Act of 1862 [7 U.S.C. 301 et seq.] and its progeny, and against public and private Black colleges and universities in the award of Federal grants and contracts, and the distribution of Federal resources under this chapter and other Federal programs which benefit institutions of higher education; the current state of Black colleges and universities is partially attributable to the discriminatory action of the States and the Federal Government and this discriminatory action requires the remedy of enhancement of Black postsecondary institutions to ensure their continuation and participation in fulfilling the Federal mission of equality of educational opportunity; and financial assistance to establish or strengthen the physical plants, financial management, academic resources, and endowments of the historically Black colleges and universities are appropriate methods to enhance these institutions and facilitate a decrease in reliance on governmental financial support and to encourage reliance on endowments and private resources.”). See also, Brown & Sitapati, *Race Across Boundaries*, *supra* note 27. See also, U.S. Department of Education *supra* note 26, for a brief overview on the Executive Branch commitment to HBCUs.

In *United States v. Fordice*,²⁹ the Supreme Court addressed the question of a State's duty to "dismantle its prior *de jure* segregated system."³⁰ The court set forth the standard of determining whether a violation of the Equal Protection Clause exists:

If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects -- whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system -- and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose.³¹

It is clear from Justice Thomas' concurrence³² and a subsequent United States Department of Education Notice regarding the application of *Fordice*³³ that there are "sound educational justifications" for continuing and strengthening HBCUs.

²⁹ 505 U.S. 717 (1992).

³⁰ *Id.* at 721.

³¹ *Id.* at 731-32.

³² *Id.* at 748-49 ("In particular, we do not foreclose the possibility that there exists "sound educational justification" for maintaining historically black colleges *as such*... Obviously, a State cannot maintain such traditions by closing particular institutions, historically white or historically black, to particular racial groups. Nonetheless, it hardly follows that a State cannot operate a diverse assortment of institutions -- including historically black institutions -- open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another. No one, I imagine, would argue that such institutional *diversity* is without 'sound educational justification,' or that it is even remotely akin

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Analogous to HBCUs, HSIs³⁴ play an important role in educating Hispanic Americans³⁵ and yet they too face problems similar to HBCUs resulting from deficient funding.³⁶

The Department of Education also offers support to Native American-Serving Non-Tribal Institutions, classified as such by having an enrollment of ten-percent or more Native-American

(Continued)

to program *duplication*, which is designed to separate the races for the sake of separating the races.”).

³³ 59 Fed. Reg. 4271 (1994). United States Department of Education: Notice of Application of Supreme Court Decision, *available at* <http://www.ed.gov/about/offices/list/ocr/docs/fordice.html> (last visited April 13, 2009) (“...State systems of higher education may be required, in order to overcome the effects of past discrimination, to strengthen and enhance traditionally or historically black institutions...”).

³⁴ An Hispanic Serving Institution is defined as: “an institution of higher education that...has an enrollment of undergraduate full-time equivalent students that is at least 25 percent Hispanic students at the end of the award year immediately preceding the date of the application.” 20 U.S.C. 1101(a)(5) (2009).

³⁵ National Center for Education Statistics: Status and Trends in the Education of Hispanics, *available at* <http://nces.ed.gov/Pubs2003/Hispanics/Section12.asp> (last visited April 13, 2009) (“In 1999, Hispanic enrollment in HSIs accounted for nearly one-half (45 percent) of the total Hispanic undergraduate enrollment in colleges and universities, nearly the same proportion they accounted for in 1990 (46 percent). Hispanic enrollment in HSIs accounted for 42 percent of the total enrollment in HSIs, up from 29 percent in 1990.”). *See also*, 20 U.S.C. 1101(a)(3) (2009) (“Despite significant limitations in resources, Hispanic-serving institutions provide a significant proportion of postsecondary opportunities for Hispanic students.”).

³⁶ 20 U.S.C. 1101 (a)(4) (2009). “Relative to other institutions of higher education, Hispanic-serving institutions are underfunded. Such institutions receive significantly less in State and local funding, per full-time equivalent student than other institutions of higher education.” *Id.*

Students.³⁷ The purpose of this program is “to support institutions of education in their effort to increase their self-sufficiency by improving academic programs, institutional management, and fiscal stability.”³⁸ Tribal Colleges and Universities (TCUs)³⁹ are also recognized as important educational and community institutions for young and old alike.⁴⁰

Non-profit organizations and Native American Tribal Nations that provide broadband training in a manner analogous to HBCUs, HSIs, NASIs, and AASIs should also be given preference when determining the distribution of grants for expanding public computer center capacity and broadband literacy, outreach, and adoption service capacity.

³⁷ See Department of Education: Native American-Serving Non-Tribal Institutions Program (CCRAA) available at <http://www.ed.gov/programs/nasnticcraa/eligibility.html> (last visited April 13, 2009).

³⁸ See *id.* under “Purpose,” available at <http://www.ed.gov/programs/nasnticcraa/index.html>.

³⁹ See Exec. Order No. 13270, 67 Fed. Reg. 45288 (July 8, 2002).

⁴⁰ *Id.* (“Tribal colleges are both integral and essential to their communities. Often they are the only postsecondary institutions within some of our Nation’s poorest rural areas. They fulfill a vital role: in maintaining and preserving irreplaceable languages and cultural traditions; in offering a high-quality college education to younger students; and in providing job training and other career-building programs to adults and senior citizens. Tribal colleges provide crucial services in communities that continue to suffer high rates of unemployment and the resulting social and economic distress.”). See also, Therese Bissell, Note, *The Digital Divide Dilemma: Preserving Native American Culture While Increasing Access to Information Technology on Reservations*, 2004 U.Ill. J.L. Tech. & Pol’y 129, 144 (2004). Discussing the background and statistics of TCUs.

7. Grants for Innovative Programs to Encourage Sustainable Adoption of Broadband Service: The Recovery Act directs that not less than \$250,000,000 of the BTOP shall be awarded for grants for innovative programs to encourage sustainable adoption of broadband services.

(a) What selection criteria should be applied to ensure the success of this program?

- NTIA should apply grant selection criteria for BTOP funds in a manner that: 1) stimulates broadband adoption and telecom literacy for low-income, minority and multicultural consumers; 2) funds minority business enterprises (MBEs), SDBs, and organizations that have a demonstrated commitment, and ability, to support local community-based projects, and that are culturally and linguistically competent to provide products and services for low-income, minority, and multicultural communities; and 3) sets the \$250 million set forth in the Recovery Act as a floor, not a ceiling, for broadband adoption efforts.

Broadband adoption

As set forth in the attached letter filed with Acting FCC Chairman Copps on March 31, 2009,⁴¹ of a number of organizations representing people of color recently convened a gathering of leaders to discuss and determine how broadband policies in the new

⁴¹ See letter from representatives of the National Urban League, the Minority Media & Telecommunications Council, the Council of LaRaza, the Asian American Justice Center, and the Joint Center for Political and Economic Studies (the "Summit Hosts"), to FCC Chairman Copps (Mar. 31, 2009) (hereinafter "Copps Letter"), attached hereto at Appendix B.

Administration can advance minority communities in key areas such as education, healthcare, and energy. The Broadband Opportunity Summit (the “Summit”) was held in Washington, DC on February 25, 2009, included a group of 30 representatives of diverse organizations, which discussed many of the topics that the Recovery Act instructs NTIA to address in its broadband grant program.

Addressing barriers to broadband adoption emerged from the Summit as one of the most pressing issues in communities of color in urban and rural America, with an emphasis on socially, financially, or culturally disadvantaged members of the communities, and other so-called “vulnerable” communities (such as senior citizens in these communities). The Summit Hosts were encouraged to develop the foundation for a broadband opportunity coalition composed of organizations that represent the interests and concerns of our most vulnerable communities, and to provide our insights to NTIA and the FCC to establish and to implement a universal broadband policy that leaves no one behind.

- The following are our recommendations on the criteria that should be used to guide NTIA’s BTOP grant application process.

- **1. Significant weight should be given to grant applications that stimulate broadband adoption and telecom literacy for low-income, minority and multicultural consumers.**

- According to the Pew Internet and American Life Project, African Americans and Hispanics lag significantly behind the national averages for broadband subscription rates.⁴²

⁴² Pew Study, *supra* note 5 at 13.

Participants in the Summit expressed concern that, even when broadband is available and affordable for members of our communities, it is not necessarily adopted by members of these communities due to factors such as:

- a lack of vision as to how broadband benefits them;
- lack of technical knowledge and training, i.e., “digital literacy;”
- language/linguistic barriers;
- lack of relevant content;
- fear/privacy concerns; and
- other culturally-specific factors related to the online experience.

Moreover, additional, unspecified obstacles can affect not only the level of broadband adoption but also the ability to gather broadband adoption data in our communities, suggesting that effective training and data gathering must be conducted by persons of perceived trust in the communities that are targeted for outreach efforts. Several of our supporters would be well-qualified to conduct effective training, data gathering, and to provide relevant content that would increase the level of broadband adoption in communities of color in rural and urban America, with an emphasis on socially, financially, or culturally disadvantaged members of the communities.

Summit participants expressed concern that, because non-adopters in their constituent base often do not understand the meaning and the purpose of broadband, it is the responsibility of the federal and local political leaders and community groups to “paint a vision” for the constituent communities of how life with broadband is no longer a luxury, but is essential to their ability to participate meaningfully in society. Summit participants noted that local politicians will have to be educated because many politicians do not understand the importance of broadband adoption any more than their constituents.

Moreover, Summit participants detailed how broadband can be beneficial the targeted communities, by enabling efforts such as:

- enhances k-12 and higher education opportunities through “virtual education;”
- online job search and applications;
- comparison shopping for prescription drugs;
- working from home to ease the burdens of fixed income and to reduce energy consumptions, i.e., “telework” or “telecommuting;”
- staying better in touch with family and loved ones;
- eliminating social isolation/depression;
- increasing access to news and information;
- using telehealth applications such as remote diabetes testing from home;
- accessing customer service platforms for most business enterprises;
- accessing state and local government services; and
- engaging in meaningful civic participation.

As a result, we believe that NTIA should give significant weight to applications that propose to increase broadband adoption and telecom literacy for low-income, minority and multi-cultural communities in rural and urban America to ensure that these communities can fully participate in the benefits of an increasingly digital society.

2. Significant weight should be given to grant applications that have a demonstrated commitment, and ability, to support local community-based projects and are sponsored by minority business enterprises (MBEs) or SDBs, focusing on those MBEs or SDBs and that are culturally and linguistically competent to provide services and products for these communities.

The Broadband Diversity Supporters are concerned that broadband stimulus dollars reach the communities that are most in need of stimulus, particularly low-income, minority, and multicultural communities. Those are the same communities that have been particularly hard hit

by the current economic recession. Therefore, NTIA should ensure that BTOP grant money goes directly to MBEs, SDBs, and community-based organizations that have “feet in the street”—not grant-application mills that are out of touch with the real needs of the communities most in need of help.

Entities that satisfy this criteria would include MBEs, especially community-based for-profit and non-profit organizations, community technology centers, community economic development centers, workforce training centers, faith-based non-profits, social service organizations, and/or collaborative networks of these entities, and SDBs. These organizations are key to efforts to bridge the broadband divide by:

stimulating job creation in hard-hit areas of high unemployment, particularly urban and rural communities of color that are often most dramatically affected by economic downturns

facilitating digital literacy through the creation of culturally relevant content

facilitating computer ownership and training, and

otherwise enhancing community access to technology.

Following are examples of the competence of certain MBEs and other community-based organizations, or in some cases, national organizations with community affiliations, that have demonstrated their effectiveness in reaching the communities that are most in need of assistance:

- The **National Urban League** works through its 102 local affiliates to provide direct technical training services designed to educate, train and provide resources to residents in local communities. For instance, the Milwaukee chapter partnered with local Boys & Girls Clubs and schools to provide 92 computers in the homes, schools, and after-school programs of local students. In Baltimore, the Urban League’s tech center trains adults in

office-related tech skills such as word processing, spreadsheets and email while lending a hand to students seeking help with their homework or SAT prep.

- **National Council of LaRaza** works with language minority communities and has experience with the ways in which broadband can improve access to critical translated information in their communities, particularly in the areas of healthcare and public safety. Based on their experiences, they believe that broadband offers promising solutions involving ELL (English Language Learner) instruction for this community.⁴³
- **One Economy** works with affordable housing owners, nonprofit organizations, municipalities and technology companies in more than 50 communities around the world to build Digital Inclusion programs to ensure that the benefits of technology are extended to low-income individuals. One Economy has connected more than 300,000 Americans to broadband Internet access, and its Digital Connectors program engages community youth – through training and eventual employment – to serve as tech ambassadors in their communities.
- One Economy's **PIC.TV** has developed relevant but entertaining content such as its “*Diary of a Single Mom*” series, and an interactive “toolbox” called “The Beehive” that enables users to find out relevant information about single parenting, personal finance, tax preparation, home ownership, education, and healthy living. There was widespread agreement among organizations representing community groups at the Broadband Opportunity Summit that providing online content that is meaningful will drive adoption.⁴⁴

Coincidentally, these organizations tend culturally to reflect the communities in which they are based, and they are often minority-owned or minority-managed and focused on increasing disadvantaged workers participation and training in the local community. Their

⁴³ See Copps Letter, *supra* note 41.

applications should be given significant weight to ensure that stimulus dollars get to those who are most in need of support.

3) NTIA correctly sets the \$250 million set forth in the Recovery Act as a FLOOR, not a ceiling, for broadband adoption efforts.

In establishing statutory grant criteria, Congress expressly states that NTIA may make competitive grants that “facilitate access to broadband service by low-income, unemployed, aged, and otherwise vulnerable populations in order to provide educational and employment opportunities to members of such populations.”⁴⁵

Those of us who take broadband for granted know that it can increase educational and economic opportunities, improve job skills, in information technology as in other fields, and otherwise enhance the quality of everyday work and home life as expressed above. For these reasons, we endorse NTIA’s interpretation that the \$250 million specifically mentioned in the Recovery Act establishes a floor, not a ceiling, for grant funds targeted to increase broadband adoption.

In conclusion, we applaud NTIA for its efforts to be inclusive in the grant application process, consistent with the intent of Congress and the Obama Administration in designing the broadband stimulus law and policies, and we urge NTIA to ensure that the Obama Administration’s efforts to establish a universal broadband policy that leaves out no members of

⁴⁵ Recovery Act Sec. 6001(g)(4).

our society. We support a broadband plan that is designed for all Americans, by all Americans, and for the benefit of all Americans.

We urge NTIA to award BTOP grants that: 1) stimulate broadband adoption and telecom literacy for low-income, minority and multicultural consumers, and 2) fund MBEs, SDBs, and other organizations that have a demonstrated commitment, and ability, to support local community-based projects, and that are culturally and linguistically competent to provide products and services for low-income, minority, and multicultural communities.

Finally, we applaud NTIA's recognition that the \$250 million slated for broadband adoption the Recovery Act establishes a floor, not a ceiling, for broadband adoption efforts.

8. Broadband Mapping: The Recovery Act directs NTIA to establish a comprehensive nationwide inventory map of existing broadband service capability and availability in the United States that depicts the geographic extent to which broadband service capability is deployed and available from a commercial provider or public provider throughout each State.

(b) What specific information should the broadband map contain, and should the map provide different types of information to different users (e.g., consumers versus governmental entities)?

NTIA poses a number of questions regarding how it may “establish a comprehensive nationwide inventory map of existing broadband service and capability” that will “[depict] the geographic extent to which broadband service capability is deployed and available” from

commercial or public providers in each state.⁴⁶ Accurate maps indicating broadband coverage are essential to the success of BTOP. Knowing where broadband service is available makes it easier to determine what areas are unserved or underserved, thereby ensuring that these communities have priority as deployment projects are developed.

NTIA should require that broadband maps are multifunctional and layered to include social metrics. During the BTOP hearings, much of the discussion surrounding mapping focused on mapping and displaying rates of various technical indicators such as broadband availability, competitive service, speed, price, and adoption rates. It is just as important to map and display rates of various social indicators such as poverty status, employment status, income, race and language. Mapping must be done in a way that allows the public to ascertain the technical progress for each social metric. Social data used in mapping has helped identify or close social divides in public education,⁴⁷ housing,⁴⁸ health care,⁴⁹ resource management,⁵⁰ banking and

⁴⁶ See Joint Request for Information, *supra* note 3, at 10718.

⁴⁷ See e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 2, 27 (1970) (discussing how a school district gerrymandered and reshaped school zones in an effort to desegregate schools).

⁴⁸ See e.g., *Spallone v. United States*, 493 U.S. 265, 282-83 (1990) (Brennan J., dissenting) (discussing how the city of Yonkers, New York, “preserved and exacerbated racial residential segregation” by limiting almost all public housing to one section of the city).

⁴⁹ See e.g., Dartmouth Atlas of Health Care: Regional Disparity in Medicare Spending, Robert Wood Johnson Foundation, *available at* <http://www.rwjf.org/qualityequality/interactive.jsp?id=38> (last visited April 2, 2009) (interactive map depicting disparities in healthcare spending).

credit availability,⁵¹ pollution,⁵² electoral participation,⁵³ and insurance.⁵⁴ This source data, including technical and social factors, should be verifiable and subject to independent audit, taking due account of concerns for the protection of proprietary data.

(c) At what level of geographic or other granularity should the broadband map provide information on broadband service?

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⁵⁰ See e.g., *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971) (determining that disparities in municipal services such as street paving, street lighting, sanitary sewers, water mains and fire hydrants may violate equal protection laws); see also Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. Rev. 1095 (2008) (exploring the disparities in municipal services between cities and neighboring unincorporated areas where residents, who are often minorities, have lower incomes).

⁵¹ See e.g., Raymond H. Brescia, *Capital In Chaos: The Subprime Mortgage Crisis And The Social Capital Response*, 56 Clev. St. L. Rev. 271 (2008) (discussing the disparities in access to mortgage capital).

⁵² See e.g., Robert Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 Env'tl. L. 371 (2008) (discussing the disproportionate location of environmental hazards in or near minority and low-income communities).

⁵³ See e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 340-42 (1960) (where the boundaries of the town of Tuskegee, Alabama, were redrawn “from a square to an uncouth twenty-eight-sided figure” in an effort to deprive Black citizens of voting rights); see also, Amanda K. Baumle, *Strategic Annexation Under the Voting Rights Act: Racial Dimensions of Annexation Practices*, 24 Harv. BlackLetter J. 81 (2008) (exploring how annexation of territories with high populations of non-minorities often results in dilution of the minority votes).

⁵⁴ See e.g., *Saunders v. Farmers Ins. Exch.*, 440 F.3d 940, 942-43 (8th Cir. 2006) (discussing allegations that insurance companies discriminated against minorities by charging rates other than the rate filed with the regulatory agency based on geography).

Data collection for these technical and social metrics must be done at the census tract or street level. Collecting granular data ensures that broadband maps will more accurately reflect what neighborhoods are unserved and underserved. NTIA should reject broadband mapping methods based on zip codes because they tend to overestimate the rate of broadband penetration, especially in rural areas where zip codes are rather large.⁵⁵ The presence of one subscriber in a zip code area does not ensure that all residents in that area have access to broadband service.

Broadband mapping should be performed on a longitudinal basis, with new data available every three months. Deployment and adoption of new technology has the potential to move at a rapid pace.⁵⁶ Policy makers and regulators need current, accurate data so that they can adjust

⁵⁵ For example, in 2007 the Federal Communications Commission (FCC) collected broadband data by zip code, a measurement that does not accurately reflect broadband availability. See Industry Analysis and Technology Division of Wireline Competition Bureau, Federal Communications Commission, *High-Speed Services for Internet Access: Status as of December 31, 2007*, at 4 (released January 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-287962A1.pdf (last visited March 31, 2009) (stating that “more than 99% of the country’s population lives in the more than 99% of Zip Codes where a provider reports having *at least one* high-speed service subscriber”) (emphasis provided). In March 2008, the FCC proposed to collect data by Census Tract instead of by zip code to ensure that data collected in relation to broadband use and deployment is more detailed. See *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans*, 23 FCC Rcd 9691, 9695 ¶ 10 (2008). One year later, the FCC initiated a rulemaking proceeding and sought comment on data collection and other matters in relation to the Broadband Stimulus Initiatives. See Comment Date Established for Report on Rural Broadband Strategy, GN Docket No. 09-29, *Public Notice*, DA 09-561 (released March 10, 2009).

1. ⁵⁶ **Broadband adoption in homes increased 15 percent between 2006 and 2008, with a 24 percent increase in homes with household incomes**

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their approach to broadband deployment if it appears that sufficient progress is not being made to bridge the digital divide in communities where poverty, income, race and language disparities exist.

9. Financial Contributions by Grant Applicant: The Recovery Act requires that the Federal share of funding for any proposal may not exceed 80 percent of the total grant. The Recovery Act also requires that applicants demonstrate that their proposals would not have been implemented during the grant period without Federal assistance. The Recovery Act allows for an increase in the Federal share beyond 80 percent if the applicant petitions NTIA and demonstrates financial need.

(a) What factors should an applicant show to establish the “financial need” necessary to receive more than 80 percent of a project’s cost in grant funds?

NTIA and RUS should adopt a rebuttable presumption that specifies that HBCUs, HSIs, AASIs, NASIs, SDBs, Native American Tribal Nations, as well as nonprofit organizations, would not be expected to generate, internally or from third-party sources, 20 percent of a project’s cost. Requiring grant applicants to put up 20 percent of a project’s cost is an unnecessary market entry barrier that works to the disadvantage of public interest organizations and universities that are working to correct the very institutional mechanisms that have

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between \$20,000 and \$40,000 between 2007 and 2008. See Pew Study, *supra* note 5, at 5.

historically allowed deep-pocketed incumbents to provide large amounts of collateral, to the exclusion of applicants working in the non-profit and educational sectors.

This would be a rebuttable presumption. This proposal is not intended to allow all universities, non-profits, and small businesses to forego paying the 20 percent collateral, irrespective of endowments and revenue. NTIA and RUS could establish a threshold for determining which non-profit and university, tribal, and SDB applicants fall within the scope of organizations envisioned by such an exception; namely, those that have historically been excluded and prevented from competing in telecommunications.

10. Timely Completion of Proposals: The Recovery Act states that NTIA shall establish the BTOP as expeditiously as practicable, ensure that all awards are made before the end of fiscal year 2010, and seek assurances from grantees that projects supported by the programs will be substantially completed within two (2) years following an award. The Recovery Act also requires that grant recipients report quarterly on the recipient's use of grant funds and the grant recipient's progress in fulfilling the objectives of the grant proposal. The Recovery Act permits NTIA to de-obligate awards to grant recipients that demonstrate an insufficient level of performance, or wasteful or fraudulent spending (as defined by NTIA in advance), and award these funds to new or existing applicants.

(a) What is the most efficient, effective, and fair way to carry out the requirement that the BTOP be established expeditiously and that awards be made before the end of fiscal year 2010?

All contract requirements and procurement practices that could cause underutilization or exclusion of most SDBs should be avoided. These practices include needlessly short deadlines for the commencement and completion of projects. SDBs should be given an exemption from the two year project completion deadline requirement. For far too long, SDBs have been systematically excluded from contract and procurement opportunities based on onerous

requirements and unrealistic deadlines.⁵⁷ To avoid the continuation of such unfair practices, NTIA should not tolerate common exclusionary tactics such as: excessive bonding requirements, bundling of small and medium sized projects into large packages, previous “very large project” experience and, number of years in business. Any exceptions should be based on compelling necessity and clearly and articulately defined in the implementing regulations.

⁵⁷ See *Final Broward County Small Disadvantaged Business Enterprise (SDBE) Disparity Study*, April 2001, available at <http://sbc.senate.gov/hearings/testimony/080911%20Supplementary/flauderdaleisparity.pdf> (last visited April 9, 2009) Minority and women-owned firms do indicate that they have more problems accessing business resources than do non-minority males. *Id.* Minority firms find it particularly difficult to deal with bonding and insurance requirements, and generally have a more difficult time getting access to operating capital. *Id.* For nearly every type of business obstacle, minority and women-owned firms report having more difficulty overcoming these obstacles. *Id.* See also *Race, Sex, and Business Enterprise: Evidence from Denver, Colorado*, May 2006. <http://sbc.senate.gov/hearings/testimony/080911%20Supplementary/FinalDenverReport.pdf> (last visited April 9, 2009) (This study found both statistical and anecdotal evidence of business discrimination against minority and women-owned disadvantaged business enterprises in virtually all major procurement categories and data sources.). See Testimony of Anthony W. Robinson, President, Minority Business Enterprise Legal Defense and Educational Fund, before the United State House of Representatives Subcommittee on Government Management, Organization and Procurement of the Committee on Oversight and Government Reform (Sept. 26, 2007) <http://governmentmanagement.oversight.house.gov/documents/20070926175613.pdf> (last visited April 9, 2009) (“[A] number of agencies group or ‘bundle’ contracts together, making it difficult for MBEs and other disadvantage businesses to serve as prime contractors on such large contracts. Bundling has frustrated Congress’ goal of giving the maximum practicable opportunities for small businesses and MBEs.”).

11. Reporting and Deobligation: The Recovery Act also requires that grant recipients report quarterly on the recipient's use of grant funds and progress in fulfilling the objectives of the grant proposal. The Recovery Act permits NTIA to de-obligate funds for grant awards that demonstrate an insufficient level of performance, or wasteful or fraudulent spending (as defined by NTIA in advance), and award these funds to new or existing applicants.

(c) If such spending is detected, what actions should NTIA take to ensure effective use of investments made and remaining funding?

NTIA should contract with a professional mediation firm ("ADR") or firms that possess telecommunications industry experience, and refer potentially troubled projects to the firm(s) to attempt to resolve difficulties that otherwise could lead to deobligation. This will assist new SDBs who are often unfamiliar with the government contracting process, to become more adept at meeting project reporting and other administrative requirements.

SDBs make good faith efforts to meet all reporting or administrative requirements but, as a result of being new to government procurement and contracting processes, they sometimes fall short of meeting administrative deadlines.⁵⁸ More often than not, these shortcomings are not due to fraudulent or wasteful behavior.

⁵⁸ Testimony of Anthony W. Robinson, President, Minority Business Enterprise Legal Defense and Educational Fund, before the United State House of Representatives Subcommittee on Government Management, Organization and Procurement of the Committee on Oversight and Government Reform (Sept. 26, 2007), <http://governmentmanagement.oversight.house.gov/documents/20070926175613.pdf> (last visited April 9, 2009) (citing the problems that remain in public contracting, "[B]ecause MBEs lack

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As a result of the difficulty in obtaining working capital, credit, and project financing, many SDBs experience problems in acquiring the project management expertise that is needed for government contracting. This results in unfamiliarity with government administrative and reporting requirements that sometimes lead to SDBs lack of timely reporting as compared to their majority counterparts.

Recognizing the critical importance of SDBs in economic development and fostering the growth of this nation's economy, NTIA should make all efforts to ensure vigorous participation of SDBs in BTOP. By referring potentially problematic projects to a telecommunications mediation firm, the NTIA could resolve potential reporting problems before they lead to deobligation. This will help to ensure a maximum level of SDB participation in the BTOP.

12. Coordination with USDA's Broadband Grant Program: The Recovery Act directs USDA's Rural Development Office to distribute \$2.5 billion dollars in loans, loan guarantees, and grants for broadband deployment. The stated focus of the USDA's program is economic development in rural areas. NTIA has broad authority in its grant program to award grants throughout the United States. Although the two programs have different statutory structures, the programs have many similar purposes, namely the promotion of economic development based on deployment of broadband service and technologies.

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access and reputation in the existing core of businesses...[t]hey also often lack sufficient staff to make these inroads or assist a business [to] comprehend and comply with regulatory requirements.”).

(a) What specific programmatic elements should both agencies adopt to ensure that grant funds are utilized in the most effective and efficient manner?

NTIA should establish a mechanism that permits it to track and report to the public and Congress the success of SDBs with respect to number of and dollar amount of grant awards. This will provide the data necessary to ensure that SDBs are achieving the very substantial level of grant success envisioned by Congress. For its part, RUS should take steps to affirmatively support SDB applicants and applicants who are partnered as prime or as subcontractors, with SDBs. In order to gauge RUS success in this regard, RUS should provide the same kind of reporting to the public and to Congress as provided by NTIA. And in that regard, RUS should coordinate with NTIA to either use NTIA's system or establish its own comparable reporting system.

RUS focus in this regard is underscored by P.L. 95-507 where the SBA Act states that it is the federal government's policy to facilitate "the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups."⁵⁹ Further, Section 15(k) of the SBA Act⁶⁰ requires each federal agency with procurement power to establish an OSBDU and to appoint an OSBDU director to report directly to the Agency head, or deputy, regarding the fulfillment of the purposes of the SBA

⁵⁹ See 15 U.S.C. §631(f)(1)(E) (2009); *see also* 92 Stat. at 1760.

⁶⁰ 15 U.S.C. §644(k) (2009).

Act.....⁶¹ The history of the New Deal and its non-inclusion of African Americans and other ethnic minorities illustrates what could go wrong if the RUS does not take affirmative steps to promote SDB success.⁶²

- (b) **In cases where proposals encompass both rural and non-rural areas, what programmatic elements should the agencies establish to ensure that worthy projects are funded by one or both programs in the most cost effective manner without unjustly enriching the applicant(s)?**

In such a circumstance, priority should be given first to those applicants that are SDBs, and secondly to those applicants that are more focused on the low income and minority segments of the population.

⁶¹ See Office of Federal Procurement Policy (OFPP) Letter No. 79-1, dated March 7, 1979 (“OFPP Letter”) (interpreting Section 15(k)).

⁶² See Ira Katznelson, “When Affirmative Action Was White” (2005) (Illustrating the degree to which New Deal programs were implemented in deliberately discriminatory ways “forever altering the economic arena in America” and stating that “laws like the Social Security Act were worded to deny benefits to entire categories of people, many of them minorities working as maids, farmers, and migrant workers”); See also Michael Dawson, “The Real Deal on the New Deal,” Washington Post (March 9th, 2009) (stating that “the New Deal reinforced structural black economic disadvantage in many ways”), available at <http://www.theroot.com/views/real-deal-new-deal>, last visited on April 3rd, 2009; See also David E. Bernstein, “Only One Place of Redress: African Americans, Labor Relations, and the Courts from Reconstruction to the New Deal,” (2001) (stating “Broad-based New Deal legislation typically did not have discriminatory intent but had harsh, foreseeable discriminatory effects.”).

13. Definitions: The Conference Report on the Recovery Act states that NTIA should consult with the FCC on defining the terms “unserved area,” “underserved area,” and “broadband.” The Recovery Act also requires that NTIA shall, in coordination with the FCC, publish nondiscrimination and network interconnection obligations that shall be contractual conditions of grant awards, including, at a minimum, adherence to the principles contained in the FCC’s broadband policy statement (FCC 05-15, adopted August 5, 2005).

- (d) Are there other terms in this section of the Recovery Act, such as “community anchor institutions,” that NTIA should define to ensure the success of the grant program” If so, what are those terms and how should those terms be defined, given the stated purposes of the Recovery Act?**

The Small Business Act permits federal agencies and departments to adopt their own small business size standards rather than relying on the default size standards developed by the SBA.⁶³ NTIA should adopt size standards for SDBs that will maximize SDB participation. As detailed in our answer to Question 4(a) above, a \$40 million revenue test, as currently employed by the FCC in its small business test, will facilitate SDB participation. Further, as also described in answer to Question 4(a) above, NTIA should define an SDB as having 51 percent control of governance of the voting interest in the company controlled by disadvantaged persons or entities

⁶³ See 13 CFR §121.402 (2009) (requiring small businesses to meet the size standard of the SIC code specified in the agency solicitation for procurement, but allowing “the procuring agency contracting officer, or authorized representative” to determine which SIC codes will apply to a given solicitation as well as “the classification which would best serve the purposes of the Small Business Act.”)

and, in the interest of time (and subject to monitoring), it should authorize self-certification of SDB eligibility.

14. Measuring the Success of the BTOP: The Recovery Act permits NTIA to establish additional reporting and information requirements for any recipient of grant program funds.

The success of the BTOP will be measured by the cumulative success of the individual programs funded by each grant. Because of the anticipated large number of grants, and the fact that likely they will be awarded in three sequential groups spanning a year, it is vitally important to the overall program that success be measured accurately and in a transparent manner early in the process through the quarterly reports that each grantee must submit pursuant to Section 6001((i)(1) of the Recovery Act. To conduct meaningful and sufficiently detailed quarterly evaluations, we recommend that NTIA establish and fund a National Minority and Broadband Training and Technical Council to evaluate the success of projects on specified criteria and, as appropriate, to make suggestions for improvement. As noted in answer to questions above, including NTIA Section 4(a), tracking and measuring SDB success, both by number and by the overall dollar value of grants awarded, is paramount to ensuring that SDB success in grant awards achieves the levels and goals envisioned by Congress in the Stimulus Act.

(a) What measurements can be used to determine whether an individual proposal has successfully complied with the statutory obligations and project timelines?

As stated in the Joint Request for Information, the Recovery Act at Section 6001(i)(2) authorizes NTIA to establish additional reporting and information requirements for any recipient of BTOP funds. To maximize the benefits from the BTOP, this authority must be utilized in a

meaningful yet efficient manner so that adjustments can be made dynamically as the program proceeds. To help accomplish this objective, NTIA should establish and fund an independent National Minority and Broadband Training and Technical Council (NMBTT Council) to provide guidance and project evaluations. Doing so would help meaningfully measure: (1) participation by qualified socially and economically disadvantaged small business concerns as provided by Section 6001(h)(3) of the Recovery Act; and (2) success in attaining the statutory objectives of (a) increasing the affordability and subscribers to broadband in the area addressed; (b) providing the fastest broadband speed possible to subscribers; and (c) enhancing health care delivery and education as provided by Section 6001(h)(2) of the Recovery Act.

It will be necessary to perform detailed analyses of the quarterly reports submitted by grantees to quantify the degree to which these purposes have been met, as measured against both the statutory provisions and the proposal of the grantee. Establishment of an NMBTT Council would facilitate timely and independent analysis of the reports, provide meaningful analysis of accomplishments, and promote corrections where necessary. Of particular focus in this analysis should be the extent to which SDBs have succeeded in the grant process.

Further, as noted in answer to previous questions, SDBs, with their more limited resources and experience as compared with larger applicants, should be permitted additional flexibility with respect to reporting requirements and timelines.

(b) Should applicants be required to report on a set of common data elements so that the relative success of individual proposals may be measured? If so, what should those elements be?

The Recovery Act wisely establishes that the quarterly reports of all grantees will be published on the Internet, but publication of thousands of reports in thousands of different

formats will not necessarily lead to the intended transparency and meaningful public review without more. To attain the statute's objectives, NTIA should require:

- The use of a uniform format and elements within each report;
- Reports to be posted directly to the Internet simultaneously with electronic submission to the agency;
- documents to be posted in an established format that permits text searches; and
- reports to be organized by geographic area—such as by State and counties within a State—to facilitate the intended review by the public being served as well as by the agencies involved.

Grantees also must be required to report on new subscribership that results from the build out, and particular, how socially and economically disadvantaged persons have been served. This mandate should call on grantees to go beyond subscription numbers; they should be required to include information on subscription rates, community training programs to demonstrate broadband opportunities and services, and access to broadband-enabled computers in public places such as libraries and schools. Very specific hardware and software availability and training should be targeted to unserved and underserved populations and this training should be tracked and reported. The purpose must be seen as not only providing access to broadband, but also the training to individuals in the communities in order to enable economic development. Thus the demographics of those residing in the area being served should be quantified using standard measures and the increase in subscriptions or the number of residents who receive training needs to be tracked and reported to ensure that the new broadband plant truly enables personal development and achievement leading to community economic development.

15 Please provide comment on any other issues that NTIA should consider in creating BTOP within the confines of the statutory structure established by the Recovery Act.

Outside reviewers should have expertise in administering programs with 8(a) SDB components.

The Broadband Technology Opportunities Program grant review process should be administered by NTIA with an eye toward maximizing diversity in the composition of grant reviewers, decision makers, and funding outcomes. Bias among reviewers on the basis of race, national origin, gender, religion, or geographic bias would likely result in suboptimal public policy outcomes, with potential blindness to the needs of disadvantaged and under-represented populations in unserved and underserved areas. Likewise, decision-makers selected with indifference to diversity may share such blindness, leading to undesirable outcomes. Finally, the outcomes of each funding stage should be scrutinized with the greatest degree of sensitivity to serving diverse segments of the American population.

In the past, Federal agencies have utilized external consultants to assist with the review of grant applications, often drawn from academic institutions.⁶⁴ External reviewers are typically given specific criteria and instructions for the review of grant applications, and their evaluations are then considered by the decision-makers to reduce the time required to reach funding

⁶⁴ For example, the Department of Housing and Urban Development used external reviewers to evaluate grant applications from municipalities for the balance of states funding in the Community Development Block Grant program in the late 1970's.

decisions. This strategy has great merit if it is properly administered. However, the use of external reviewers has great potential for unintentional bias resulting in undesirable public policy outcomes, unless it is properly designed.

To ensure the greatest integrity in the application review and decision-making process, the Secretary of Commerce should establish a Diversity Advisory Committee (“DAC”), appointing the Director of NTIA’s Minority Telecommunications Development Program (MTDP) (discussed below) as the Designated Federal Official, and tasked with providing guidance to the Assistant Secretary for Communications and Information on the prevention and avoidance of bias in the broadband stimulus grant application review and decision-making process. Among other things, this advisory committee should be given the opportunity to review in advance the composition of internal or external reviewers to identify any concerns regarding potential racial, gender, religious, ethnic, or geographic bias. In addition, the DAC should be tasked with advising the Assistant Secretary on the means to give the greatest meaning to Section 6001(h)(3), regarding opportunities for socially and economically disadvantaged small business concerns, and to review funding outcomes to identify areas for improvement regarding diversity.

NTIA’s administration of the broadband stimulus grant program would be enhanced by such diverse input, especially if the DAC is comprised of representatives from the widest range of social and economic backgrounds, including representatives from the civil rights community (e.g., the National Urban League, the Asian American Justice Center, the National Council of LaRaza, etc).

An entity that does not receive funding in one round should be eligible to reapply in subsequent rounds.

Broadband Diversity Supporters urge the NTIA to allow an entity that does not receive funding in one round to be eligible to re-apply in subsequent rounds. We believe that this causes

no harm to the process and may benefit smaller business enterprises, such as SDBs and MBEs and organizations that may not have Washington lobbyists or connections, to fully participate in the BTOP grant process.

Moreover, this approach is consistent with the nature and intent of the broadband stimulus goals of inclusiveness, it could facilitate the types of collaborations contemplated by the stimulus law by allowing unsuccessful grant applicants to re-apply in collaboration with other grant applicants, and it could enable all applicants to take advantage of the experience gained through participation in the initial grant application process.

SDB monitoring, coordination, and outreach should be undertaken by a resuscitated, well-funded and fully staffed Minority Telecommunications Development Program (MTDP).

When it was first established in 1978, NTIA's Minority Telecommunications Development Program (MTDP), worked to ensure that minorities and women had fair access to the public communications spectrum to communicate views and information relevant to their communities, and to own businesses that can provide competitive and innovative telecommunications services. For a number of years, the now-dormant MTDP⁶⁵ successfully administered its mission and successfully developed programs and policies to increase minority ownership of broadcast and telecommunications businesses by providing policy input for the

⁶⁵ In 2003, the MTDP, as a result of lack of interest in the goals of the MTDP in the Bush Administration, the program became dormant.

development of legislation and regulations that affect minority business participation in the telecommunications industry. It became the go-to source for data as to current trends and business opportunities in broadcasting and telecommunications for minority entrepreneurs.

In the past, MTDP has engaged in some of the following activities consistent with its mission:

- Regularly monitored the impact of regulatory and industry developments on minority broadcast ownership
- Published reports on the status of minority commercial broadcast ownership
- Convened meetings of current and prospective minority broadcast station owners, new media entrepreneurs, financiers, and public policy advocates to discuss ideas for overcoming challenges to media ownership for minorities
- Published report on minority access to capital. (NTIA's 1995 report on capital access for minority participation in telecommunications published NTIA's findings that the high cost of broadcast properties, and the large investments required to bid effectively in FCC spectrum auctions, and to fund operations, if successful, made access to capital a critical factor for successful participation in the converging telecommunications industry).
- Established *ComTrain*, a management training program for minority broadcast owners, that is administered by MTDP. Minority broadcaster participants reported that ComTrain was the most useful government program designed to assist minority broadcast owners.
- In January 2001, MTDP issued its last report, the *Minority Broadcast Ownership Report*. Produced with help from the Economics and Statistics Administration, it is the leading Federal resource on minority ownership and provides new baseline data on minority ownership and a discussion of key issues related to entry.

- Until 2007, MTDP maintained an active resource website for minorities on various issues concerning broadcast and telecommunications ownership, training, and policy participation.⁶⁶

Access to the tools of the new digital economy are key to the economic success and advancement of all Americans, yet “vulnerable” groups such as African Americans, Hispanics, seniors, persons with disabilities, low income people in disadvantaged urban and rural America, continue to lag behind national averages in terms of access to and adoption of broadband.

The Broadband Diversity Coalition suggests that there is no need to “re-invent the wheel” when it comes to implementing policies to address the needs of people of color in urban and rural America. We urge the NTIA to aggressively resuscitate the MTDP and to insure that it serves an active role in the BTOP program by providing much-needed input into the manner in which BTOP grants are administered (such as inclusion of a Diversity Advisory Committee, described above) In particular, SDB monitoring, coordination, and outreach concerns could be administered by a resuscitated, well-funded, and fully staffed MTDP.

2. III.RUS: Request for Information

- 3. What are the most effective ways RUS could offer broadband funds to ensure that rural residents that lack access to broadband will receive it? For a number of years, RUS has struggled to find an effective way to use the Agency’s current broadband loan program to provide broadband**

⁶⁶ See NTIA MTDP Resource Center, <http://www.ntia.doc.gov/opadhome/mtdpweb/resources.htm> (last visited April 13, 2009).

access to rural residents that lack such access. TUS believes that the authority to provide grants as well as loans will give it the tools necessary to achieve that goal. RUS is looking for suggestions as to the best ways to:

- (c) ensure that Recovery Funding is targeted to unserved areas that stand to benefit the most from this funding opportunity.**

Rural areas that stand to benefit the most from Recovery Act funding are unserved or underserved low-income, minority and multilingual rural communities. In order to ensure that these rural areas benefit from the Recovery Act funding opportunity, RUS should evaluate the socioeconomic characteristics of a project area, in addition to evaluating whether the project area meets the qualification provisions in the Recovery Act appropriation language.⁶⁷

Specifically, one RUS grant and loan program appropriation provision requires that “at least 75 percent of the area...be in a rural area without sufficient access to high speed broadband service to facilitate rural economic development, as determined by the Secretary of Agriculture.”⁶⁸ However, this qualification alone only ensures that the project area is rural, and will not ensure in any way that the RUS funding will benefit broadband service deprived low-income minority and multilingual rural communities.

It is critical that in addition to the qualifications set forth in the Recovery Act, RUS evaluate a qualified rural area’s socioeconomic characteristics to close disparities by poverty,

⁶⁷ Recovery Act, Division A, Title 1.

⁶⁸ *Id.*

unemployment, race, and language in rural broadband deployment. For instance, this evaluation would include understanding the pricing needs of low-income, aged, unemployed, and otherwise vulnerable populations. Furthermore, RUS should evaluate whether qualified applicants are located in historically underserved communities, communities with a single provider, and communities receiving service at speeds below the minimum. By making this evaluation, RUS will be able to determine which rural area will benefit the most from the available funds.

4. In what ways can RUS and NTIA best align their Recovery Act broadband activities to make the most efficient and effective use of the Recovery Act broadband funds? In the Recovery Act, Congress provided funding and authorities to both RUS and the NTIA to expand the development of broadband throughout the country. Taking into account the authorities and limitations provided in the Recovery Act, RUS is looking for suggestions as to how both agencies can conduct their Recovery Act broadband activities so as to foster effective broadband development. For instance:

(b) How should the agencies structure their eligibility requirements and other programmatic elements to ensure the applicants that desire to seek funding from both agencies (i) do not receive duplicate resources and (ii) are not hampered in their ability to apply for funds from both agencies?

NTIA and RUS should coordinate their efforts to ensure that eligibility requirements and programmatic elements do not thwart the objectives of the Small Business Administration's

diversity objectives.⁶⁹ In other words, applicants should be encouraged to incorporate and maximize SDB and/or MBE sponsorship in both applications if submitted to each of NTIA and RUS. To the extent that an applicant submits applications to both agencies, the NTIA and RUS should coordinate and provide oversight to ensure that, in awarding grants, NTIA and RUS give priority to the application proposal that maximizes SDB and MBE participation or sponsorship, whether that be the NTIA or the RUS application.

5. How should RUS evaluate whether a particular level of broadband access and service is needed to facilitate economic development?

- (a) How should RUS define “rural economic development?” What factors should be considered, in terms of job growth, sustainability, and other economic and socioeconomic benefits?**

The RUS evaluation of the “rural economic development” of an area to be served by a project seeking RUS funds is critical to ensure that the RUS funding is targeted to provide for broadband connectivity to unserved and underserved communities. To promote “rural economic development,” RUS should evaluate the socioeconomic characteristics of a qualified rural area, which includes understanding the pricing needs of low-income, aged, unemployed, and otherwise vulnerable populations. Furthermore, RUS should evaluate whether qualified applicants are located in historically underserved communities, communities with a single

⁶⁹ See *infra* NTIA Section 12(a)(discussing importance of including 8(a) priorities in RUS funding priorities).

provider, and communities receiving service at speeds below the minimum. Through these evaluations, RUS should be able to identify opportunities to provide funding that will promote the closure of disparities by poverty, unemployment, race, and language in rural broadband deployment.

As stated above, the overriding priority of RUS should be to apportion funds to provide broadband connectivity to both the unserved and underserved communities, within which the majority of funding must be targeted towards the most needy segment, namely low income consumers.⁷⁰

- 6. In further evaluating projects, RUS must consider the priorities listed below. What values should be assigned to those factors in selecting application? What additional priorities should be considered by RUS? Priorities have been assigned to projects that will:**
- 1. give end-users a choice of internet service providers,**
 - 2. serve the highest proportion of rural residents that lack access to broadband service,**
 - 3. be projects of current and former RUS borrowers, and**
 - 4. be fully funded and ready to start once they receive funding under the Recovery Act.**

RUS should consider the substantial participation of SDBs in the BTOP program a top priority. RUS should ensure that all parties, including states and their designees, comply with all federal rules regarding SDBs. RUS should also avoid contract provisions that could ensure

⁷⁰ In answer to NTIA Section 1(a) *infra*, we provide detail as this further segmentation.

underutilization or exclusion of SDBs, such as aggregating discrete projects or geographic areas into needlessly large bundles, imposing needlessly short deadlines for commencement/completion of a project, previous very large project experience, and imposing excessive years-in-business or bonding requirements.⁷¹

Further, RUS should establish expedited and favorable (at least tie-breaker) consideration for prime contractors that voluntarily include in their bids genuine and substantial first tier MBE or SDB participation beyond the minimum federal Section 8(a) guidelines for MBE or SDB utilization, and have an established method to track and report verifiable outcomes on a periodic basis. RUS should also establish expedited and favorable consideration for bids that voluntarily propose substantial initiatives to hire and train skilled and low-skilled unemployed minority labor in broadband technologies. Finally, RUS should also establish expedited and favorable consideration for bids that voluntarily demonstrate a substantial and verifiable history of MBE or SDB utilization in the specific technical areas of the contract, rather than the company's overall record of MBE or SDB utilization, which may include janitorial and related services dominated by MBEs but having nothing to do with broadband and wireless technical services.⁷²

On its face, the RUS priority that gives preference to those project applications that are "from borrowers or current borrowers under title 11 of the Rural Electrification Act of 1936, and

⁷¹ See *infra* NTIA Section 2(c)(3).

⁷² See *id.*

for project applications that include such borrowers or former borrowers”⁷³— favors incumbents and conflicts with the underlying policy of Section 309(j) of the Communications Act.⁷⁴ Therefore, this priority should be de-emphasized and fall when RUS has the opportunity to provide support to an SDB.

5. What benchmarks should RUS use to determine the success of its Recovery Act broadband activities? The Recovery Act give RUS new tools to expand the availability of broadband in rural America. RUS is seeking suggestions regarding how it can Measure the effectiveness of its funding programs under the Recovery Act. Factors to consider include, but are not limited to:

A. Business and residences with “first-time” access

B. Critical facilities provided new and/or improved service:

(i) Educational institutions

(ii) Healthcare Providers

(iii) Public service/safety

C. Business created or saved

D. Job retention and/or creation

E. Decline in unemployment rates

F. State, local, community support

The success of RUS’ Recovery Act broadband activities will be measured by the cumulative success of the individual activities funded by each grant. There is anticipated to be a

⁷³ See Recovery Act, Division A, Title 1.

⁷⁴ See 47 U.S.C. §309(j)(2009)(favoring designated entities and promoting, *inter alia*, minority ownership).

large number of grants, making it essential to the overall program that success be measured accurately and in a transparent manner throughout the process.

The statute requires the Secretary of Agriculture to report quarterly to Congress, and recipients similarly should be required to report quarterly on key progress aspects of their program. To facilitate analysis and aggregation, these reports should be required to be filed electronically. The reports should be available immediately on a public website to foster transparency, enhance public trust in the program, and to permit viewing by residents in the target area of each grantee. A means should be permitted for viewers to electronically submit comments on each recipient report (in a manner similar to the way that readers can post comments to articles on many websites).

The Broadband Diversity Supporter coalition has proposed that NTIA establish and fund an independent National Minority and Broadband Training and Technical Council (NMBTT Council) to provide guidance and assistance with project evaluations. Although the statutory authority for the RUS is not identical to that for NTIA, we strongly urge that RUS include benchmarks to measure the participation of qualified SDB concerns specifically and adopt benchmarks evaluating participation under USDA's existing Section 8(a) authority more generally.

We generally agree with regard to the factors set forth in the Joint Request for Information, provided that they provide detail on minority participation. Businesses and residences with "first-time" access, for example, should include subcategories for rural and for minority businesses and homes. Particularly because of a history of certain neighborhoods and areas being bypassed or excluded during broadband construction, applicants should be required to bring their broadband facilities past *all* streets and residences within the area of their grant.

Similarly, reporting priority should be given to tracking broadband service to *all* educational institutions, health facilities, public service and safety agencies, libraries, community centers, senior centers and facilities, and multiple-occupant buildings. Each should constitute a separate benchmark. For each benchmarked facility, applicants should be required to state in their quarterly reports how many of each type of facility are within its grant area, how many now are newly-passed by the grantee's broadband facilities, and how many of those are connected. The applicant should have to provide an explanation for any such facility *not* passed. In addition, if the facility has not connected, the applicant should be required to ascertain the reason and to report it.

6. IV Conclusion

For these reasons, the Broadband Diversity Supporters request that the NTIA and the U.S. Department of Agriculture administer the BTOP and RUS programs, as set for the in the Recovery Act, to be consistent with these comments.

Respectfully submitted,

BROADBAND DIVERSITY SUPPORTERS

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April 13, 2009

**Before the
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
AND THE RURAL UTILITIES SERVICE OF THE U.S. DEPARTMENT OF
AGRICULTURE**

In the Matter of)	
)	
Joint National Telecommunications and)	Docket No. 090309298-9299-01
Information Administration-Rural Utilities)	
Service Request for Information)	
)	

To: National Telecommunications and Information Administration of the United
States Department of Commerce and the Rural Utilities Service of the U.S.
Department of Agriculture

COMMENTS OF THE BROADBAND DIVERSITY SUPPORTERS

APPENDIX

A. List of signatories

B. Letter from Congressional Black Caucus et al. to Nancy Pelosi

C. Letter to Chairman Copps, March 31, 2009.

Appendix A

APPENDIX A

BROADBAND DIVERSITY SUPPORTERS

Organizations:

1. American Indians in Film and Television
2. Asian American Justice Center
3. Association of Hispanic Advertising Agencies
4. Black College Communication Association
5. Black Entertainment and Sports Lawyers Association
6. Black Leadership Forum, Inc.
7. Dialogue on Diversity
8. Hispanic Institute
9. Hispanic Technology and Telecommunications Partnership
10. Joint Center for Political and Economic Studies
11. Independent Spanish Broadcasters Association
12. International Black Broadcasters Association, Inc.
13. International Business Kids
14. Latinos in Information Sciences and Technology Association
15. Latino Public Broadcasting
16. Lawyers' Committee for Civil Rights Under Law
17. League of United Latin American Citizens
18. Minority Media and Telecommunications Council
19. National Association for the Advancement of Colored People
20. National Association of Black Journalists
21. National Association of Black Owned Broadcasters
22. National Association of Black Telecommunications Professionals
23. National Association of Hispanic Journalists
24. National Association of Investment Companies
25. National Association of Neighborhoods
26. National Bar Association
27. National Coalition for Asian Pacific American Community Development
28. National Congress of Black Women, Inc.
29. National Council of La Raza
30. National Indian Telecommunications Institute
31. National Urban League
32. Native American Journalists Association
33. Organization of Chinese Americans
34. Rainbow PUSH Coalition
35. UNITY: Journalists of Color, Inc.

MBEs and SDBs:

1. Applied Wireless Local Area Network, Inc.
2. AVC Global
3. Council Tree Communications, Inc.
4. Eezinet Corporation
5. incNETWORKS
6. Litera Corp.
7. Massachusetts Local Telephone Company, Inc.

MBEs and SDBs (continued)

8. M2Z Networks
9. Neatt Wireless, LLC
10. Punch Media Group
11. Ronson Network Services Corp.
12. ThinkSmartNow
13. Wilco Electronic Systems, Inc.

Descriptions of the Broadband Diversity Supporters

Organizations:

American Indians in Film and Television is devoted to promoting broadband to the grossly underserved communities on Indian reservations.

The **Asian American Justice Center (AAJC)** works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education and litigation.

The **Association of Hispanic Advertising Agencies (AHAA)** strives to grow, strengthen, and protect the Hispanic marketing and advertising industry by providing leadership in raising awareness of the value of the Hispanic market opportunities and enhancing the professionalism of the industry.

The **Black College Communication Association (BCCA)** is comprised of faculty, administrators and publications advisers at Historically Black Colleges and Universities (HBCUs) who work to identify resources necessary for strengthening communications programs at HBCUs.

The **Black Entertainment and Sports Lawyers Association (BESLA)** is an international organization of lawyers and other entertainment and sports industry executives that supports a more diversified, expert and informed group of entertainment and sports industry professionals.

The **Black Leadership Forum, Inc.**, comprised of the nation's leading African American organizations, links leadership to legislation.

Dialogue on Diversity promotes the economic and civic well-being of women of America's diverse cultural communities.

The **Hispanic Institute** is a Washington DC based nonprofit organization that provides an effective education forum for an informed and empowered Hispanic America.

The **Hispanic Technology and Telecommunications Partnership (HTTP)** is a coalition of twenty national and regional U.S. Hispanic organizations that works to increase awareness of the impact of technology and telecommunications policy on the Hispanic community.

The **Joint Center for Political and Economic Studies** is one of the nation's leading research and public policy organizations, and the only one that focuses primarily on the concerns of African Americans and other people of color.

The **Independent Spanish Broadcasters Association (ISBA)** is an association of Hispanic-owned broadcasters that is a participant in FCC proceedings aimed at promoting minority ownership and employment in the media.

The **International Black Broadcasters Association, Inc. (IBBA)** is a network of radio, television, and record executives that brings decision-makers and trendsetters together to exchange powerful information and ideas necessary for future growth.

International Business Kids teaches financial literacy and entrepreneurship to children and youth with in-school, after-school and summer camp training components.

The **Latinos in Information Sciences and Technology Association (LISTA)** has offered workshops on computers, software and Internet use, English as a Second Language and after-school activities to 250 clients, and has helped more than 1,500 households in applying for their DTV converter box coupons.

Latino Public Broadcasting supports the creation of non-commercial television programming that is representative of Latino people, or addresses issues of interest to Latino Americans.

The **Lawyers' Committee for Civil Rights Under Law**, a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy, leverages the skills and resources of the bar to obtain equal opportunity for minorities by addressing factors that contribute to racial justice and economic opportunity.

The **League of United Latin American Citizens (LULAC)** is the largest and oldest Hispanic organization in the United States, with a mission to advance the education, employment, housing and civil rights of Latinos.

The **Minority Media and Telecommunications Council (MMTC)** is the nation's principal advocate for diversity in the media and telecommunications industries.

The **National Association for the Advancement of Colored People (NAACP)** works to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination.

The **National Association of Black Journalists (NABJ)** is an organization of journalists, students and media-related professionals that provides quality programs and services to and advocates on behalf of Black journalists worldwide.

The **National Association of Black Owned Broadcasters (NABOB)** is the only trade association representing the interests of the 245 radio and 13 television stations owned by African Americans across the country, providing them with a voice and a viable presence in the industry to increase minority station ownership and to improve the business climate in which these stations operate.

The **National Association of Black Telecommunications Professionals (NABTP)** provides venues for positive professional dialogue, leadership development and collaboration with stakeholders who have the desire to translate good public policy into opportunities for all communities.

The **National Association of Hispanic Journalists (NAHJ)** is dedicated to increasing the number and enhancing the professional development of Hispanics in the news industry, and advocating for improved coverage of the Latino community by the news media.

Founded in 1971, the **National Association of Investment Companies (NAIC)** is the trade association for funds that invest in the emerging domestic market, including women and minority owned businesses as well as businesses in underserved communities.

The **National Association of Neighborhoods**, one of America's largest and oldest grassroots multi-issue membership organizations, focuses on bringing together its 2,500 members to improve the quality of life in the nation's most important communities - its neighborhoods.

The **National Bar Association**, founded in 1925, is the oldest and largest national association of African American lawyers and judges.

The **National Coalition for Asian Pacific American Community Development (National CAPACD)** works on housing, community development and economic justice issues as they impact low income Asian American, Pacific Islander and Native Hawaiian people and communities where they live.

The **National Congress of Black Women, Inc.** is a non-profit organization organized to provide activities for lifting the horizons of young people by providing them with mentors and positive role models, introducing them to traditional and non-traditional professions, and teaching them life skills.

The **National Council of La Raza (NCLR)** is the largest national Hispanic civil rights and advocacy organization in the United States.

The principal mission of the **National Indian Telecommunications Institute (NITI)** is to deploy broadband to rural Native Americans.

The mission of the **National Urban League** is to enable African Americans to secure economic self-reliance, parity, power and civil rights.

The **Native American Journalists Association (NAJA)** is a nonprofit journalists' association representing and donating scholarships to journalists throughout the United States and Canada.

The **Organization of Chinese Americans**, with over 80 chapters and college affiliates, is dedicated to advancing the social, political, and economic well-being of Asian Pacific Americans in the United States.

The **Rainbow PUSH Coalition** is a progressive organization protecting, defending and expanding civil rights to improve economic and educational opportunity.

UNITY: Journalists of Color, Inc. is a strategic alliance of the Asian American Journalists Association, National Association of Black Journalists, National Association of Hispanic Journalists and the Native American Journalists Association, together with an outreach to nearly 10,000 journalists advocating for fair news coverage about people of color, and challenging news organizations to reflect the nation's diversity at all levels.

MBEs and SDBs:

Applied Wireless Local Area Network, Inc. (AWLAN) is an information technology company with a focus on research and development (R&D), design, installation, and maintenance of medium/large scale wireless local area networks - Wi-Fi hotspots, WiMax, and municipal wireless.

AVC Global is experienced in the execution of major federal and commercial telecommunications, broadband and data center network facilities design, installation and management projects.

Council Tree Communications, Inc. invests private equity in communications businesses that have meaningful sponsorship from members of minority groups or have business plans offering services tailored to the interests and needs of minority communities.

The **Eezinet Corporation** is a start-up wireless communications service provider that has acquired PCS broadband spectrum in six underserved rural markets: Bend, OR; Boise/Nampa, ID; Scottsbluff, NE; Grand Island/Kearney, NE; Oklahoma City, OK; and Greenwood, SC.

incNETWORKS offers 3GPP Release-8 compatible 4G network solutions, including an all-IP hybrid fiber-wireless service that enables commercial, quad-play wired and wireless voice, broadband and real-time services, including the world's first multiparty video conferencing on cellular phones, laptops and desktop computers.

Litera Corp. is a technology leader in document change management and collaboration.

Massachusetts Local Telephone Company, Inc. is a provider of ULEC services, including wireline and wireless, in Boston.

M2Z Networks is a Silicon Valley venture backed broadband wireless company with significant minority ownership and management that is planning to provide an innovative and free nationwide broadband service throughout the United States.

Neatt Wireless, LLC is an African American owned, managed, controlled and operated facilities-based wireless telecommunications company with spectrum licenses covering twenty-five urban and rural counties in northeastern Arkansas.

Punch Media Group is a new media and technology company specializing in cutting-edge youth culture, including setting new standards and maintaining the energy and creativity of the hip-hop culture.

Ronson Network Services Corp. is a certified small minority-owned business that provides facility engineering, installation, surveys and studies to the telecommunication companies and government entities, and consulting services to emerging technology companies.

ThinkSmartNow is a minority, woman and veteran owned business providing systems engineering, network architecture, ANSI/ISO security integration services to the commercial market and government industries within the Department of Defense (DoD), Intelligence Community (IC) and the National Security Agency (NSA).

Wilco Electronic Systems, Inc. is a minority and family-owned Private Cable Operator in Philadelphia, Pennsylvania, where it serves as a Multiple Dwelling Unit telecommunication services provider and a cable service provider, and community cable channel owner and operator for low income residential communities.

* * * * *

Appendix B

Congress of the United States
Washington, DC 20515

February 11, 2009

The Honorable Nancy Pelosi
Speaker of the House
H-232
The United States Capitol
Washington, DC 20515

Dear Speaker Pelosi:

As leaders of the Congressional Black Caucus, Congressional Hispanic Caucus and Congressional Asian Pacific American Caucus, we are writing to bring your attention to an important provision in H.R. 1, the American Recovery and Reinvestment Act, that promotes diversity in the telecommunications marketplace. In this regard, we urge House conferees to insist on the preservation of this provision given that the Senate version of the stimulus package lacks an equivalent measure.

Under Title VI of the House bill, section 6002 directs the National Telecommunications and Information Administration (NTIA) to provide \$2.85 billion worth of grants to eligible entities that will provide wireless and wireline broadband services to unserved and underserved areas in the United States. In determining whether an eligible entity shall receive grant money, NTIA must consider several factors, one of which is whether the grantee is a "socially and economically disadvantaged business concern as defined under Section 8(a) of the Small Business Act." The Senate version of the stimulus package takes a different approach, simply directing the Assistant Secretary of Commerce to provide grant money to states or related entities in partnership.

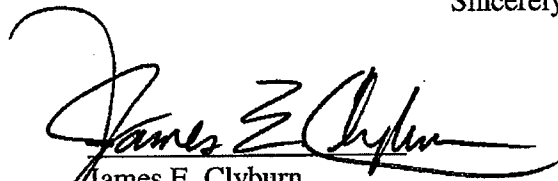
In general, we firmly believe that the House-passed version of the broadband section of the stimulus package is superior to the Senate-passed version. In particular, by directing NTIA to consider, as one of many factors, whether eligible entities are socially and economically disadvantaged businesses, the House bill ensures that *all* qualified businesses be considered eligible for grants. The Senate's approach relies on the discretion of state governments and partnerships without any consideration of diversity in the marketplace. As such, we urge the House conferees to insist on the House approach to the broadband title in order to preserve this important policy goal.

For too long, the telecommunications industry has been dominated by multi-billion dollar conglomerates with considerable economic muscle. Small businesses, particularly women and minority owned businesses that have historically faced steep barriers to credit, have difficulty competing against such well-financed companies. We believe it's time that other companies share in the promise of advanced telecommunications services and be allowed to compete. Not only do we think the House version of the broadband title is good for diversity in the marketplace, but it is

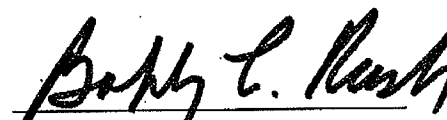
good for the economic health of the nation as a whole. Given that small businesses are the engine of job creation and economic growth, we believe that such qualified businesses be eligible for these funds to stimulate the economy, including those business concerns that have historically faced economic and social discrimination.

Thank you for your attention to this matter, and thank you for your continued leadership in the House of Representatives. We look forward to working with you as this important legislation continues to move forward and we reconcile our differences with the Senate in preparation for the President's signature.

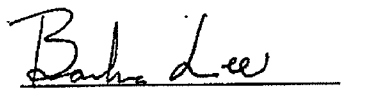
Sincerely,




James E. Clyburn
Majority Whip




Bobby L. Rush
Member
Subcommittee on Communications,
Technology and the Internet



Barbara Lee
Chairwoman
Congressional Black Caucus



Michael M. Honda
Chairman
Congressional Asian Pacific American
Caucus



Charles A. Gonzalez
1st Vice Chairman
Congressional Hispanic Caucus

Cc: Majority Leader Steny Hoyer
Chairman Henry Waxman

Appendix C



Davis Wright Tremaine LLP

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March 31, 2009

VIA COURIER

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
236 Massachusetts Avenue, N.E., Suite 110
Washington, DC 20002

COPY

STAMP & RETURN

Re: Broadband Opportunity Policies - Notice of Inquiry

Dear Ms. Dortch:

Enclosed please find an original plus four (4) copies of the Broadband Opportunity Policies submitted on behalf of the **National Urban League**, the **Minority Media & Telecommunication Council**, the **National Council of LaRaza**, the **Asian American Justice Center**, and the **Joint Center for Political & Economic Studies**.

Please date stamp the enclosed extra copy of this filing and return it to the courier. If you should have any question concerning this filing, please contact me.

Very truly yours,

Davis Wright Tremaine LLP

Maurita K. Coley

Enclosure

cc: Chairman, Michael J. Copps
Commissioner, Jonathan S. Adelstein
Commissioner, Robert M. McDowell
Mr. Scott Deutchman
Mr. Scott Bergman
Ms. Angela Giancarlo
Mr. Nicholas Alexander
Ms. Julie Veach
Mr. James Schlichting
Mr. Ian Dilner
Ms. Jennifer Schneider

FILED/ACCEPTED

MAR 31 2009

Federal Communications Commission
Office of the Secretary

March 31, 2009

Via Hand Delivery

The Honorable Michael J. Copps
Acting Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Broadband Opportunity Policies

Dear Chairman Copps:

As the representatives of policy organizations who represent the interests of people of color in urban and rural communities, we write to applaud your decision to initiate a comprehensive review of the FCC's role in formulating a "national broadband policy," and we look forward to participating fully in your deliberations in the coming months.

We agree with you that an effective national broadband plan requires an interdisciplinary, interagency approach. The FCC must lead a concerted effort by all federal agencies to move from narrowband policies that serve as barriers to the ability of all Americans to benefit from the broadband age.

Broadband Opportunity Summit

We recently convened a gathering of leaders to discuss and determine how broadband policies in the new Administration can advance minority communities in key areas such as education, healthcare, and energy. The Broadband Opportunity Summit (the "Summit") that our five organizations recently hosted in Washington, DC on February 25, 2009, included a group of 30 representatives of diverse organizations, which discussed many of the topics that Section 6001(k) of the American Recovery and Reinvestment Act ("ARRA") instructs the Commission to investigate. Specifically, we focused on how current government policies may serve as barriers in the areas of education, healthcare, and energy and the environment. We discussed what steps the government can take to ensure the "maximum utilization of broadband infrastructure and service by the public" to "advanc[e] consumer welfare, civic participation, public safety ...community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes..." including, from our

perspective, attention to minority business and disadvantaged workers participation and training. As a result of the Summit, we are in the process of developing the foundation for a broadband opportunity coalition composed of organizations who represent the interests and concerns of our most vulnerable communities in these areas.

With that context, we'd like to share with you and your colleagues some of our observations on how the Commission can work with other federal agencies to develop a national broadband policy that achieves these statutory goals. As you will note, identifying strategies that will increase adoption of broadband services in vulnerable communities was the Summit's principal finding.

Healthcare

The Obama administration's goal of reforming our healthcare system in order to reduce the cost of, and increase access to, care could benefit greatly from wider adoption of broadband. One take-away from our Summit was that, if healthcare institutions embrace telemedicine services and ensure patient privacy, we might see an increase in broadband adoption among households that currently do not subscribe. We noted that a national standard for portable electronic health records, developed by the Department of Health and Human Services as directed by the Act, is an important step in encouraging patients to take a more active role in their care – and encouraging their subscription to broadband in the process. The participants also discussed that regulations requiring doctors participating in Medicare and Medicaid to use electronic prescriptions by a certain date would help drive the demand for broadband, but that more must be done in the area of reimbursement of broadband-delivered care.

Energy

As America attempts to "go green," policymakers and environmental scientists alike are rethinking how we build homes, how we travel, how we consume, and even how we work. Our roundtable participants focused on ways to encourage businesses to adopt more flexible telework/telecommuting policies to reduce traffic, reduce harmful emissions, and increase employee productivity. Unfortunately, many businesses are fearful of embracing telework for a variety of reasons, including data privacy, liability for at-home accidents, and employee monitoring. In view of these concerns, a role for the federal government, through a combination of energy, employment and tax policy, could be to provide the blueprint for effective telework policies, encouraging more people to work from home and thereby pushing increased broadband adoption.

Education

In the area of education policy, we learned of America's declining global position in students' access to "e-learning." Policy experts in this field noted that the top ten countries in terms of e-learning access share a common trait that America lacks: a

The Honorable Michael J. Copps
March 31, 2009
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nationally-standardized K-12 curriculum. Federal law currently prohibits the Department of Education from developing such a curriculum, leading to a school district by school district patchwork of standards that often preclude distance learning. Furthermore, teacher training in 21st Century classroom skills is inconsistent. Many teachers do not know how to use the technologies themselves, let alone how to effectively employ them in (and out of) the classroom, and lack incentives to do so. Policy changes that would enable the Department of Education to create a unified e-learning policy can help ensure that a world-class education is available to every child in America.

Conclusion

There are, of course, many more opportunities for federal agencies to benefit from and boost adoption of broadband, and we believe that we are uniquely suited to assist in formulating policies that are inclusive of the communities that we represent. For instance, one of our roundtable participants has worked with state and local housing agencies to ensure that new or modernized public housing complexes are wired with high-speed communications infrastructure; the Department of Housing and Urban Development should explore policies to promote this approach. Another one of our participants has worked with language minority communities and has experience with the ways in which broadband can improve access to critical translated information in their communities, particularly in the areas of healthcare and public safety. Based on their experiences, they believe that broadband offers promising solutions involving ELL (English Language Learner) instruction for this community.

As a result of the Summit, further public dialog with other federal agencies on how their policies can be adapted or changed to expand America's broadband opportunities is needed. With leadership from the FCC, collectively we can give America the kind of comprehensive, holistic policy that leading broadband nations have adopted.

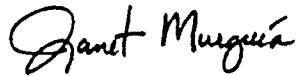
We trust these preliminary thoughts provide guidance to you and the Commission as you work toward adoption of a Notice of Inquiry at the Commission's planned April 8th Open Meeting. We again salute your inclusive approach to setting the nation's broadband policy. Thank you for your leadership on this matter and we look forward to working with you and your colleagues on this important proceeding in the months ahead.

Sincerely,

A handwritten signature in cursive script that reads "Marc Morial". Below the signature, the initials "mke" are written in a smaller, simpler script.

Marc Morial
President & CEO
National Urban League

The Honorable Michael J. Copps
March 31, 2009
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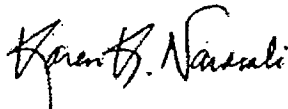
Janet Murguia
President & CEO
National Council of La Raza



Ralph B. Everett
President & CEO
Joint Center for Political and Economic Studies



David Honig
President & CEO
Minority Media and Telecommunications Council



Karen Narasaki
President & CEO
Asian American Justice Center

CC: Commissioner Jonathan Adelstein
Commissioner Robert McDowell